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TMT INTERNATIONAL OBSERVATORY, LLC

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF

Contested Case Hearing Re Conservation  
District Use Application (CDUA) HA-3568 for  
the Thirty Meter Telescope at the Mauna Kea  
Science Reserve, Ka'ohē Mauka, Hāmākua,  
Hawai'i, TMK (3) 4-4-015:009

Case No. BLNR-CC-16-002

**THE UNIVERSITY OF HAWAI'I AT  
HILO AND TMT INTERNATIONAL  
OBSERVATORY, LLC'S JOINT BRIEF  
IN RESPONSE TO PETITIONER THE  
FLORES-CASE 'OHANA'S**

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NATURAL RESOURCES  
STATE OF HAWAII

**EXCEPTIONS TO HEARING  
OFFICER'S PROPOSED FINDINGS OF  
FACT, CONCLUSIONS OF LAW AND  
DECISION AND ORDER FILED AS  
DOCUMENT 783 ON JULY 26, 2017  
[DOC. 806]; APPENDIX A;  
CERTIFICATE OF SERVICE**

**THE UNIVERSITY OF HAWAI'I AT HILO AND  
TMT INTERNATIONAL OBSERVATORY, LLC'S JOINT BRIEF  
IN RESPONSE TO PETITIONER THE FLORES-CASE 'OHANA'S  
EXCEPTIONS TO HEARING OFFICER'S PROPOSED FINDINGS OF  
FACT, CONCLUSIONS OF LAW AND DECISION AND ORDER  
FILED AS DOCUMENT 783 ON JULY 26, 2017 [Doc. 806]**

The University of Hawai'i at Hilo ("**UH Hilo**") and Intervenor TMT International Observatory, LLC ("**TIO**") jointly submit the following brief in response to Petitioner the Flores-Case 'Ohana's ("**FCO**") *Exceptions to Hearing Officer's Recommendations*, filed August 21, 2017 [Doc. 806] ("**FCO's Exceptions**") pursuant to Hawaii Administrative Rules ("**HAR**") § 13-1-43.

**I. INTRODUCTION**

On July 26, 2017, after presiding over forty-four days of testimony from October 2016 through early March 2017, and reviewing hundreds of exhibits, Judge (Ret.) Riki May Amano ("**Hearing Officer**") issued her detailed Proposed Findings of Fact, Conclusions of Law and Decision and Order [Doc. 783] ("**HO FOF/COL**"). The Hearing Officer recommended that the Conservation District Use Application HA-3568 ("**CDUA**") for the Thirty Meter Telescope ("**TMT**") Project and the attached TMT Management Plan be approved subject to a number of conditions stated therein. *See* HO FOF/COL at 260-263.

The Board of Land and Natural Resources ("**BLNR**") issued Minute Order No. 103 on July 28, 2017 [Doc. 784]. Pursuant to Minute Order No. 103, the parties to the Contested Case

Hearing (“CCH”) were given until no later than August 21, 2017 at 4:00 p.m. to file exceptions to the HO FOF/COL. Minute Order No. 103 expressly required the following for any exceptions:

The exceptions shall: (1) set forth specifically the questions of procedure, fact, law, or policy, to which exceptions are taken (2) identify that part of the recommendations to which objections are made; and (3) state all grounds for exceptions to a ruling, finding, conclusion, or recommendation. The grounds not cited or specifically urged are waived.

Minute Order No. 103 at 1; *see also* HAR § 13-1-42(b).

Minute Order No. 103 also gave the parties to the CCH until September 11, 2017 at 4:00 p.m. to file any responsive briefs. Minute Order No. 103 expressly required the following for any responsive briefs:

The responsive briefs shall: (1) answer specifically the points of procedure, fact, law, or policy to which exceptions were taken; and (2) state the facts and reasons why the recommendations should be affirmed.

Minute Order No. 103 at 2; *see also* HAR § 13-1-43(b).

The BLNR has scheduled oral arguments on the CDUA for September 20, 2017 at 9:00 a.m. *See* Minute Order No. 103 at 2.

## **II. STANDARD OF REVIEW**

The FCO and the other Petitioners/Opposing Intervenors do not state a position on the applicable standard that BLNR must review the HO FOF/COL. Hawai‘i Revised Statutes (“HRS”) § 91-11 sets out the procedure that is to be followed by an agency where a hearing officer has been employed:

**Examination of evidence by agency.** Whenever in a contested case the officials of the agency who are to render the final decision

have not heard and examined all of the evidence, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision<sup>1</sup>] containing a statement of reasons and including determination of each issue of fact or law necessary to the proposed decision has been served upon the parties, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the officials who are to render the decision, *who shall personally consider the whole record or such portions thereof as may be cited by the parties.*

HRS §91-11 (emphasis added).

The Hawai‘i Supreme Court has stated that “[t]he general rule is that if an agency making a decision has not heard the evidence, it must at least consider the evidence produced at a hearing conducted by an examiner or a hearing officer.” *White*, 54 Haw. at 13, 501 P.2d at 361. Quoting from the Revised Model State Administrative Procedure Act, Fourth Tentative Draft (1961) (“RMSAPA”), the Hawai‘i Supreme Court explained that this requirement “is to make certain that those persons who are responsible for the decision shall have mastered the record, either by hearing the evidence, or reading the record or at the very least receiving briefs and hearing oral argument. It is intended to preclude signing on the dotted line.” *Id.* at 14, 501 P.2d at 362 (citation and internal quotations omitted).

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<sup>1</sup> The Hawai‘i Supreme Court has held that a hearing officer’s recommendations can serve as the agency’s “proposal for decision” under HRS § 91-11. See *White v. Board of Education*, 54 Haw. 10, 14, 501 P.2d 358, 362 (1972); *Cariaga v. Del Monte Corp.*, 65 Haw. 404, 408, 652 P.2d 1143, 1146 (1982); see also *County of Lake v. Pahl*, 28 N.E.3d 1092 (Ind. Ct. App. 2015) (holding that it is not uncommon or per se improper for a trial court to enter findings that are verbatim reproductions of submissions by the prevailing party); *Ivie v. Smith*, 439 S.W.3d 189 (Mo. 2014) (holding that while trial courts must act independently in making findings of fact and conclusions of law, it is not error for trial court to request or receive proposed findings and, in appropriate cases, to adopt those findings); *East Coast Paving & Sealcoating, Inc. v. North Allegheny School Dist.*, 111 A.3d 220 (Pa. Commw. Ct. 2015) (holding that there is nothing untoward about a trial court adopting a party’s proposed findings of fact and conclusions of law as its own).

The Hawai‘i Intermediate Court of Appeals (“ICA”) described the “function and effect of the hearing officer’s recommendations” in *Feliciano v. Board of Trustees of Employees’ Retirement System*, 4 Haw. App. 26, 659 P.2d 77 (1983). The ICA explained that the recommendations are “to provide guidance” and an agency is “not bound by those findings or recommendations.” *Id.* at 34, 659 P.2d at 82. Indeed, an agency, after review of the reliable, probative and substantial evidence in the proceeding, may reject a hearing officer’s recommendations and “ma[ke] its own findings and conclusions based on the same evidence.” *Id.*

Therefore, BLNR must determine whether the reliable, probative, and substantial evidence in the record as a whole supports approval of the CDUA. However, and notwithstanding that it is not binding, BLNR should give due consideration to, and be guided by, the HO’s FOF/COL, particularly her determinations on the credibility of the witnesses that appeared before her. The RMSAPA provides that “[i]n reviewing findings of fact in a recommended order, the agency head shall consider the presiding officer’s opportunity to observe the witnesses and to determine the credibility of witnesses.” RMSAPA § 415(b) (October 15, 2010). Section 415(b) of the RMSAPA is consistent with the well-settled legal principle that “the fact finder is uniquely qualified to evaluate the credibility of witnesses and to weigh the evidence.” *Wilton v. State*, 116 Hawai‘i 106, 119, 170 P.3d 357, 370 (2007) (citation omitted); *see also* Haw. R. Civ. P. 52(b) (providing that “due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses”).

Other jurisdictions have gone even further and held that a hearing officer’s credibility determinations are entitled to deference so long as the record supports the determination. In *Amanda J. ex rel. Annette J. v. Clark County School Dist.*, 267 F.3d 877 (9th Cir. 2001), the

Ninth Circuit was confronted with the question of whether to affirm the State Review Officer's decision to deviate from the hearing officer's credibility determination of a witness. Joining its colleagues in the Second, Third, Fourth, and Tenth Circuits, the Ninth Circuit held that

due weight should be accorded to the final State determination . . . unless [the] decision deviates from the credibility determination of a witness whom only the [hearing officer] observed testify. ***Traditional notions of deference owed to the fact finder compel this conclusion. The State Review Officer is in no better position than the district court or an appellate court to weigh the competing credibility of witnesses observed only by the Hearing Officer.*** This standard comports with general principles of administrative law which give deference to the unique knowledge and experience of state agencies while recognizing that ***a [hearing officer] who receives live testimony is in the best position to determine issues of credibility.***

*Id.* at 889 (emphases added); see *Doyle v. Arlington Cty Sch. Bd.*, 953 F.2d 100, 105 (4th Cir. 1992) (holding that where two state administrative decisions differ only with respect to the credibility of a witnesses, the hearing officer is entitled to be considered prima facie correct); *Karl by Karl v. Board of Educ. of Geneseo Cent. School Dist.*, 736 F.2d 873, 877 (2d Cir. 1984) ("There is no principle of administrative law which, absent a disagreement between a hearing officer and reviewing agency over demeanor evidence, obviates the need for deference to an agency's final decision where such deference is otherwise appropriate."); *Carlisle Area Sch. Dist. v. Scott P.*, 62 F.3d 520-29 (3d Cir. 1995) ("[C]redibility-based findings [of the hearing officer] deserve deference unless non-testimonial, extrinsic evidence in the record would justify a contrary conclusion or unless the record read in its entirety would compel a contrary conclusion."); *O'Toole v. Olathe Dist. Schs. Unified Sch Dist. No. 233*, 144 F.3d 692, 699 (10th Cir. 1998) ("[W]e will give due weight to the reviewing officer's decision on the issues with which he disagreed with the hearing officer, unless the hearing officer's decisions involved

credibility determination and assuming, of course, that the record supports the reviewing officer's decision.”); *see also McEwen v. Tennessee Dept. of Safety*, 173 S.W.3d 815, 824 (Tenn. Ct. App. 2005) (holding that if credibility plays a pivotal role, then the hearings officers’ or administrative judge’s credibility determinations are entitled to substantial deference); *Stejskal v. Dep’t. of Administrative Svcs.*, 665 N.W.2d 576, 581 (Neb. 2003) (holding that agencies may consider the fact that the hearing officer, sitting as the trier of fact, saw and heard the witnesses and observed their demeanor while testifying and may give weight to the hearing officer’s judgment as to credibility).

Consequently, BLNR should consider and give due regard to the Hearing Officer’s credibility determinations so long as those determinations are supported by the reliable, probative, and substantial evidence in the whole record. *See* HRS § 91-14 (providing that administrative findings, conclusions, decisions and orders must be supported by “the reliable, probative, and substantial evidence in the whole record”).

### **III. GENERAL OBJECTIONS TO FCO EXCEPTIONS**

UH Hilo and TIO object to the FCO’s Exceptions to the extent that they do not comply with Minute Order No. 103 [Doc. 784] and HAR § 13-1-42(b). In some instances, the FCO’s Exceptions do not cite to specific findings or conclusions in the HO FOF/COL, and instead cite to findings or conclusions proposed by UH Hilo and TIO, and/or cite to findings or conclusions proposed by the FCO itself.

UH Hilo and TIO object to each of the points in the FCO’s Exceptions to the extent that they are irrelevant, inapplicable, immaterial, mischaracterize the evidence, misstate or misrepresent the record, rely on evidence that is not credible, biased, or incomplete, and/or not supported by the evidence in the record. UH Hilo and TIO also object to the FCO’s Exceptions to the extent they assert alleged “findings” or “conclusions” that are beyond the scope of issues

set forth in Minute Order No. 19 [Doc. 281] or beyond the scope of the authority delegated by BLNR to the Hearing Officer, or by the legislature to BLNR for these proceedings.

UH Hilo and TIO further object to the FCO's Exceptions to the extent that they raise procedural issues that were previously raised (in some cases, multiple times by multiple parties and through multiple motions for reconsideration) during the course of the CCH, and the arguments were previously fully briefed, considered and rejected by the Hearing Officer or BLNR.

UH Hilo and TIO further object to the FCO's Exceptions to the extent they seek to challenge the Final Environmental Impact Statement ("FEIS") for the TMT Project. This proceeding is not an EIS challenge; the FCO's ability to make such a challenge expired long ago, and it cannot use this proceeding to reopen the FEIS approval process. This proceeding pertains only to the CDUA and is entirely governed by applicable constitutional law, HRS Chapter 183, and the Conservation District rules, HAR Title 13, Chapter 5 that are genuinely at issue here.

UH Hilo and TIO also object to the FCO's Exceptions to the extent they are not supported by the record and/or applicable legal authority. As set forth in the HO FOF/COL, substantial evidence has been adduced to show that the CDUA satisfies the eight criteria as set forth in HAR § 13-5-30(c). The record also shows that the TMT Project is consistent with UH Hilo's and BLNR's obligations under the public trust doctrine, to the extent applicable, as well as under *Ka Pa'akai*, and Article XI, section I and Article XII, section 7 of the Hawai'i Constitution.

Ultimately, it is evident that the FCO is categorically opposed to the construction of the TMT Project regardless of whether or not it satisfies the legal criteria applicable to the CDUA.



No location on the mountain, and no combination of mitigation measures, will make the TMT Project acceptable to the FCO. That position is not supported by the law.

Appendix A contains general objections to the FCO's Exceptions, which UH Hilo and TIO hereby incorporate by reference into their response to each of the FCO's Exceptions, to the extent applicable.

In addition to the general objections in Appendix A, UH Hilo and TIO respond to the FCO's Exceptions below. Citations to the evidence in the record provided herein are not intended to be exhaustive or comprehensive, but demonstrate evidentiary support for UH Hilo and TIO's responses and objections. Pursuant to Minute Order No. 103 [Doc. 784] and HAR § 13-1-42(b), UH Hilo and TIO object to all unsupported assertions in the FCO's Exceptions, and BLNR should disregard all such unsupported assertions.

Acronyms and defined terms used herein are defined in the Index of Select Defined Terms in the HO FOF/COL.

#### **IV. SPECIFIC RESPONSES TO FCO'S EXCEPTIONS**

The specific arguments raised by the FCO in the Introduction section of the FCO's Exceptions will be addressed *infra*. However, as an initial matter, the FCO raises many of the same arguments in the FCO's Exceptions that it raised in its [Proposed] *Findings of Fact, Conclusions of Law, Recommendation*, filed May 30, 2017 [Doc. 662] ("**FCO Proposed FOF/COL**"). UH Hilo and TIO already responded in detail to the FCO Proposed FOF/COL in their Joint Response to the Flores-Case 'Ohana's Proposed Findings of Fact, Conclusions of Law, and Decision and Order, Filed May 30, 2017 [Doc. No. 734] ("**UHH-TIO Joint Response to FCO Proposed FOF/COL**"), which is incorporated herein by this reference.

UH Hilo and TIO also object to the Introduction Section in the FCO's Exceptions because it does not comply with Minute Order No. 103, HAR § 13-1-42, and the clear

requirement to “set forth specifically the questions of procedure, fact, law, or policy to which exceptions are taken” and “identify that part of the recommendations to which objections are made.” *See supra*.

The FCO also generally take exception to the HO FOF/COL claiming that the Hearing Officer merely “reduplicated” or “copied and pasted” the UHH-TIO Joint Response to FCO Proposed FOF/COL. FCO’s Exceptions at 2. The practice of adopting a party’s proposed findings of fact and conclusions of law in total or in part has been previously upheld by the courts. *See e.g., County of Lake v. Pahl*, 28 N.E.3d 1092 (Ind. Ct. App. 2015) (holding that it is not uncommon or *per se* improper for a trial court to enter findings that are verbatim reproductions of submissions by the prevailing party); *East Coast Paving & Sealcoating, Inc. v. North Allegheny School Dist.*, 111 A.3d 220 (Pa. Commw. Ct. 2015) (holding that there is nothing untoward about a trial court adopting a party’s proposed findings of fact and conclusions of law as its own); *Ivie v. Smith*, 439 S.W.3d 189 (Mo. 2014) (holding that while trial courts must act independently in making findings of fact and conclusions of law, it is not error for trial court to request or receive proposed findings and, in appropriate cases, to adopt those findings); *American Water Development, Inc. v. City of Alamosa*, 874 P.2d 352, 376 (Colo. 1994) (holding that the adoption of a proposed FOF/COL is not necessarily improper, and that “[F]indings, if otherwise sufficient, are not weakened or discredited because given in the form submitted by counsel.”) (citations omitted); *Howard v. Howard*, 259 P.2d 41, 42 (Cal. App. 2 Dist. 1953) (stating that courts may adopt proposed findings in total or in part). The HO FOF/COL, as demonstrated by the evidence cited therein and as further explained in this brief and the additional briefs filed by UH Hilo and TIO in responses to the parties’ exceptions, is supported by the “reliable, probative, and substantial evidence in the whole record.” HRS § 91-14.

The FCO's argument that the Hearing Officer merely "copied and pasted" the UHH-TIO Joint Response to FCO Proposed FOF/COL and systematically ignored their witnesses and exhibits is also plainly contradicted by the record. The HO FOF/COL cites, and in many cases quotes extensively from, the written and oral testimony of numerous Petitioners and Opposing Intervenors (and the witnesses called by those parties). *See e.g.*, HO FOF 3, 758-762, 828, 915 (K. Kealoha Pisciotta); HO FOF 5, 620, 692, 811-816, 913 (E. Kalani Flores); HO FOF 5, 400-423, 823, 831 (B. Pualani Case); HO FOF 6, 559, 807-809, 871, 894, 914 (Deborah Ward); HO FOF 4, 669 (Clarence Ching); HO FOF 7, 806 (Paul Neves); HO FOF 11, 802-803, 916, 980 (Mehana Kihoi); HO FOF 12 (Chase Michael Kaho'okahi Kanuha); HO FOF 13, 1006 (Harry Fergestrom); HO FOF 14, 787, 879 (Joseph Kualii Lindsey Camara); HO FOF 15, 805 (Jennifer Leina'ala Sleightholm); HO FOF 16 (Maelani Lee); HO FOF 17 (Richard Maele DeLeon); HO FOF 18, 560, 798-799, 853, 873, 875, 1004-1005 (Cindy Freitas); HO FOF 19, 608, 685, 786, 800-801, 831, 876 (William Freitas); HO FOF 21, 789, 880 (Kalikolehua Kanaele); HO FOF 22 (Stephanie-Malia Tabadda); HO FOF 23, 790 (Tiffnie Kakalia); HO FOF 24 (Glen Kila); HO FOF 25, 818 (Dwight Vicente); HO FOF 26 (Brannon Kamahana Kealoha); HO FOF 342-344, 463, 731-732, 753, 852, 895, 918 (Dr. Ku Kahakalau); HO FOF 320-321, 460, 514, 736, 820, 829, 950, 1003, 1012, 1017-1026, 1028-1032 (Professor Candace Fujikane); HO FOF 896, 911-912, 1001 (Marti Townsend); HO FOF 626, 824, 868, 979 (Laulani Teale); HO FOF 1043-1046 (David Frankel); FOF 700-701, 822, 917, 974 (Professor Jonathan Osorio); HO FOF 821, 825-826 (Narissa Spies); HO FOF 490-491, 664-668, 919 (Dr. Kehaunani Abad); HO FOF 627 (Diana LaRose); HO FOF 361-368, 724-725, 866-867, 967-970 (Dr. Taulii Ku'u lei Kanahele); HO FOF 618-619, 819 (Professor Peter Mills); HO FOF 817 (Davin Vicente); HO FOF 380-393, 972-973 (Dr. Manulani Aluli Meyer); HO FOF 804 (Sara Kihoi); HO FOF 660-662 (Ruth

Aloua); HO FOF 394-399, 663 (Hawane Rios); HO FOF 770-777 (Professor Gregory Johnson); HO FOF 988-991 (Nanci Munroe); HO FOF 872, 992-993 (Susan Rosier); HO FOF 796-797, 878 (Nelson Ho); HO FOF 793-795 (Professor N. Kaopua-Goodyear); HO FOF 975-977 (Professor Joseph Keaweaimoku Kaholokula); HO FOF 978 (Tammie Noelani Perreira); HO FOF 214 (Brian Cruz); HO FOF 778-782 (Prof. Mililani Trask); HO FOF 784 (Frank Nobriga); HO FOF 788 (Wiremu Carroll); HO FOF 783 (Ronald Fujiyoshi); HO FOF 459, 791, 869 (Keahi Tajon); HO FOF 537-540, 953 (Eric Hansen); and HO FOF 628, 870 (Michael Kumukauoha Lee). Significantly, the vast majority of these findings were not proposed by UHH or TIO, nor included in the UHH-TIO Joint Response to FCO Proposed FOF/COL.

**A. The TMT Project is consistent with and complies with the 2000 Master Plan and its conceptual Design Guidelines. [FCO's Exceptions at 6-7].**

The FCO's Exceptions to HO FOF 249 and 442 are Inaccurate/False, Incomplete, Unsupported/Unsubstantiated, Not Credible, and Misleading (Presented out of Context).

In HO FOF 249 and 442, the Hearing Officer found that the Design Guidelines in the 2000 Master Plan (Ex. B.37) were conceptual. She further found that the TMT Project incorporated these conceptual design guidelines in its design and, as a result, the TMT Project is consistent with and complies with the 2000 Master Plan. *See* HO FOF 249 and 442. The FCO takes exception to HO FOF 249 and 442 arguing that the Design Guidelines were not conceptual and that the TMT Project is not consistent with and does not comply with the 2000 Master Plan.

The Design Guidelines in the 2000 Master Plan were clearly conceptual. Indeed, at the time of the 2000 Master Plan, a Next Generation Large Telescope ("NGLT") was "only being discussed in the astronomy community." Ex. B.37 at IX-27. There was only "a 50 percent possibility that [a NGLT] may be developed in the next 20 years." *Id.* Notwithstanding its uncertain nature, the 2000 Master Plan, for internal planning purposes, developed a "*preliminary*

*design concept*” for a NGLT that included shaping and coloring the observatory dome “to simulate a small pu‘u to blend well with the surrounding landscape.” *Id.* at IX-37 (emphasis added). Further emphasizing that these design guidelines were merely conceptual, the 2000 Master Plan recognized that the “technology for coloring telescope enclosures has yet to be applied in practice.” *Id.* at IX-39.

Consistent with the above, Dr. Gary Sanders (“**Dr. Sanders**”) testified that the Design Guidelines in the 2000 Master Plan were conceptual. *See* Tr. 1/3/17 at 257:23-258:2. Dr. Sanders testified that the TMT Project takes into account the conceptual Design Guidelines in the 2000 Master Plan, along with other studies conducted after the 2000 Master Plan. *See* Tr. 1/3/17 at 257:16-258:2; 258:18-259:8. For example, Dr. Sanders testified that a study was conducted in connection with the Environmental Impact Statement (“**EIS**”) for the TMT Project, which concluded “that reflective materials would make the observatory from a distance less visible.” *Id.* at 258:18-22. Taking into consideration both the conceptual Design Guidelines in the 2000 Master Plan and this subsequent EIS study, the surrounding buildings of the TMT Observatory will be “colored like the volcanic material around [it][,]” and the TMT Observatory dome will have a “moderate reflective quality.” *Id.* at 258:23-259:8.

The FCO also incorrectly argues that the location of the TMT Observatory is inconsistent with the conceptual Design Guidelines of the 2000 Master Plan. The TMT Observatory is being proposed to be built in the exact location that the 2000 Master Plan planned for an NGLT to be built. *See* Ex. B.37 at IX-37; Ex. R-1 at 1-6 (“The 2000 Master Plan identifies area E as the preferred location for an NGLT.”).

Finally, the FCO also incorrectly argues that HO FOF 249 and 442 are contradicted by HO FOF 181 and 182. There is no contradiction. The reliable, probative, and substantial

evidence in the whole record supports the fact that the TMT Project is consistent with the conceptual Design Guidelines in the 2000 Master Plan. *See* HO FOF 181(2).<sup>2</sup>

In sum, there is reliable, probative, and substantial evidence in the whole record to support HO FOF 249 and 442. The FCO's Exceptions to HO FOF 249 and 442 are meritless and should be rejected.

**B. The University is in compliance with the Comprehensive Management Plan ("CMP") (Ex. A-9) and its Subplans [FCO's Exceptions at 7-11].**

The FCO's Exceptions to HO COL 161 is Inaccurate/False, Mischaracterization, Incomplete, Unsupported/Unsubstantiated, Not Credible, and Misleading (Presented out of Context).

HO COL 161 provides:

Petitioner Flores-Case 'Ohana's position is that the University is not in compliance with the CMP because it has not been updated. Ex. B.02a at 4; (Flores) Tr. 1/30/17 at 31:16-17. When the BLNR approved the CMP, it only required the University or its designee to submit and present annual reports on the status of the CMP management actions. The BLNR does not require the University to prepare a five-year update, as Mr. Flores argued, but provides that OMKM may do one. Ex. B.02z at § 4.2.2 at 17. This language is permissive, not mandatory. OMKM's position is that a separate five-year review and a five-year amendment is premature because five years is too short a period to fully vet all management actions. If OMKM were to amend the CMP, it would be relatively minor edits such as the spelling of place names and eliminating redundancies. Moreover, a five-year review is not necessary because OMKM's annual reports are cumulative and reflect everything that was done since the CMP was first implemented. Ex. A-133 at 5-6; Tr. 12/12/16 at 180:8-181:1. Therefore, all

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<sup>2</sup> The TMT Project is consistent with and complies with the conceptual Design Guidelines in the 2000 Master Plan. Even assuming, *arguendo*, however that it was not, the FCO does not cite to any legal authority holding that the BLNR would be prohibited from approving the CDUA if the TMT Project was not consistent with and did not comply with the conceptual Design Guidelines of the 2000 Master Plan. Nevertheless, the BLNR does not need to reach the FCO's unsupported argument because the TMT Project is consistent with and complies with the conceptual Design Guidelines in the 2000 Master Plan.

information that would have been included in a five-year review was and is incorporated in annual reports, such as OMKM's 2015 annual report.

*Id.*

Preliminarily, BLNR's approval of the CDUA is subject to the eight criteria in HAR § 13-5-30(c). The FCO fails to cite to any legal authority holding that the University's alleged lack of compliance with the CMP is a basis to deny the CDUA and/or that it prohibits or precludes the BLNR from approving the CDUA. *See generally* FCO's Exceptions. HAR § 13-5-24 provides that astronomy facilities "under a management plan approved simultaneously with the permit" are a permitted use under the resource subzone of the conservation district. *Id.* at R-3. However, the FCO argues later in the FCO's Exceptions that the applicable management plan is the TMT Management Plan that is attached to the CDUA, not the CMP. *See* FCO's Exceptions at 14. Consequently, even assuming, *arguendo*, that the University is not in compliance with the CMP, which is disputed, *see infra*, the FCO fails to cite to any legal authority holding that such alleged lack of compliance is a basis to deny the CDUA.

The FCO argues that HO COL 161 is inaccurate and/or misleading because the CMP required the University to submit a five-year report as part of management action, MEU-1.<sup>3</sup> MEU-1 provides in full: "Establish a reporting system to ensure that the MKMB, DLNR, and the public are informed of results of management activities in a timely manner." Ex. A-9 at 7-64. Under "[a]dditional [c]onsiderations[.]" the CMP provides that "[a] variety of annual and five-year reports are required as part of the evaluation process for the CMP." *Id.* There is no dispute that the University, through OMKM, has been submitting annual reports to BLNR from 2010 to

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<sup>3</sup> In arguing that HO COL 161 is inaccurate and misleading, the FCO neglects to mention that its own FCO Proposed FOF/COL stated that a "five-year management outcome assessment [is] recommended." FCO FOF 434. FCO FOF 434 did not state or argue that a five-year report was required.

the present. *See* Exs. A-16 to A-22. These annual reports provide timely updates on the University's progress and results on the management actions in the CMP. *See* Exs. A-16 to A-22. Moreover, these annual reports are cumulative, meaning they reflect the progress and results since the CMP was first implemented. Tr. 12/12/16 at 180:8-181:11; November 25, 2014 OMKM Regular Meeting Minutes, Ex. A-133 at 6 (noting that the next annual report – *i.e.*, the 2015 annual report – “would essentially cover the past five year of activities”); Ex. A-16 to A-22. Consequently, although it may not have been expressly described as or titled a five-year report, the 2015 annual was a five-year report given the cumulative nature of OMKM's annual reports. The University has therefore “[e]stablish[ed] a reporting system to ensure that the MKMB, DLNR, and the public are informed of results of management activities in a timely manner” in compliance with MEU-1.

The FCO next argues that HO COL 161 is inaccurate and/or misleading because the CMP required the University to complete a “five-year major review and revision” under management action, MEU-2. Preliminarily, MEU-2 provides in full: “Conduct *regular* updates of the CMP that reflect outcomes of the evaluation process, and that incorporate new information about resources.” Ex. A-9 at 7-64 (emphasis added). Stephanie Nagata (“**Ms. Nagata**”) testified that the CMP is updated every year. *See* Tr. 12/12/16 at 180:8-181:1. Consequently the CMP is updated regularly in compliance with MEU-2.

Under “[a]dditional considerations” for MEU-2, the CMP provides that “[t]he CMP *should be* updated every five years.” Ex. A-9 at 7-65 (emphasis added). The five-year update or revision is therefore not required as argued by the FCO in the FCO's Exceptions. Ironically, notwithstanding its argument now, the FCO in its FCO Proposed FOF/COL recognized that the update and revision of the CMP was not mandatory. *See* FCO FOF 440 (providing that “[a]



major review and revision of the CMP *should* occur every five years, using information contained in the annual reports) (citing Ex. B. 28 at 7-64) (emphasis added). In any event, as reflected in the annual reports, the five-year CMP “[r]evision process [has been] initiated by OMKM for eventual submission to BLNR.” Ex. A-20 at 18 of 18; Ex. A-21, Appx. A at 27 of 27. OMKM noted in its November 25, 2014 Regular Meeting Minutes:

The CMP has gone through an initial review. However, being that it is only five years since the CMP was put into action, it was felt that insufficient time has passed to fully vet all the management actions. For this first evaluation, the changes are basically housekeeping measures. For example, updating old information, replacing the two word spelling of place names with one word and eliminating redundancies. Some actions were clarified to avoid confusion by ensuring there is only one set of actions instead of multiple actions for the same issue. For example, the CMP includes an action relating to invasive species management, but the CMP also requires the development of an invasive species management plan.

The CMP actions were also reviewed for consistency. In particular, the primary reasons for action are resource protection and health and safety of visitors and those who work on the mountain.

Ex. A-133 at 5-6.

Consequently, the University has been reviewing the CMP as contemplated by and in compliance with MEU-2. The mere fact that the University may not have completed a five year review at this time does not mean that it is not in compliance with MEU-2. Moreover, the FCO fails to identify any prejudice to itself or anyone else in connection with the University’s review process.

The FCO also cite to FCO FOF 426-451 to support its argument that HOL COL 161 “is clearly inaccurate and false.” FCO’s Exceptions at 12. The FCO’s reiteration of its FCO Proposed FOF/COL is improper as detailed *supra* in Section III, General Objections to FCO’s

Exceptions. Nevertheless, to the extent considered, UH Hilo and TIO incorporate by this reference their prior responses to FCO FOF 426-451. *See* UHH-TIO Joint Response to FCO Proposed FOF/COL at B-93 to B-101.

In sum, the reliable, probative, and substantial evidence in the whole record supports the conclusion that the University is in compliance with the CMP and its Subplans. There is no question that the University has been applying and using the CMP as intended, that is, as “a guide for managing existing and future activities and uses, and to ensure ongoing protection of Mauna Kea’s cultural and natural resources.” Ex. A-9 at iii.

**C. The TMT Project satisfies the eight criteria in HAR § 13-5-30(c).**

The reliable, probative, and substantial evidence in the whole record supports the Hearing Officer’s conclusion that the TMT Project satisfies the eight criteria in HAR § 13-5-30(c). *See infra*; *see also* HO FOF 424-1033; HO COL 124-297.

FCO’s Exceptions to HO FOF 426 and 427 [FCO’s Exceptions at 12-13]: The FCO’s Exceptions to HO FOF 426 and 427 are Inaccurate/False, Not Credible, and Unsupported/Unsubstantiated. There is reliable, probative, and substantial evidence in the whole record to support HO FOF 426 and 427. For example, as to HO FOF 426, there is no dispute, and the FCO does not cite to any evidence to dispute, that “[i]n preparing the CDUA, the University’s consultants relied on a wide variety of materials as well as consultation with, *inter alia*, specialists and archaeologists.” *Id.* The FCO likewise does not cite to any evidence to dispute HO FOF 427.

The FCO generally argues that Perry White (“**Mr. White**”) “provided outdated, incomplete, inaccurate and misleading information regarding the CDUA.” FCO’s Exceptions at 12. The FCO, however, does not cite to or identify any specific information in the CDUA that Mr. White provided that is “outdated, incomplete, inaccurate [or] misleading.” *Id.* The FCO

also generally argues that Mr. White's written direct testimony was inaccurate and included several discrepancies. The FCO, however, again fails to cite to or identify any specific testimony from Mr. White that it claims was inaccurate or a discrepancy. Such unsupported and unsubstantiated exceptions should be rejected.

The FCO notes that Mr. White testified that he was advised by UH Hilo's counsel to refer to TIO instead of TMT Observatory Corporation in his written direct testimony. Such testimony by Mr. White is irrelevant to and does not contradict HO FOF 426 and 427. It also does not establish that Mr. White's testimony was inaccurate or included discrepancies.

The FCO argues that the Hearing Officer systematically ignored, disregarded and/or did not give full consideration to its and other Petitioners and Opposing Intervenor's witnesses. See FCO's Exceptions at 13. The FCO's argument is baseless and unfounded. The Hearing Officer expressly stated that she considered all of the witness testimony and documents received into evidence in this matter:

The Hearing Officer considered the testimony of all witnesses at the evidentiary hearings and all exhibits received into evidence. The mere fact that a particular witness testimony or exhibit may not be specifically referred to below does not and shall not be construed to mean that said testimony or exhibit was not considered. Rather, specific reference to said witness testimony or exhibit was excluded because, after due consideration of said testimony or exhibit, it was determined to be: (i) immaterial, (ii) irrelevant, (iii) contrary to law, (iv) less credible or persuasive, and/or (v) cumulative of other testimonies or exhibits specifically referred to below.

HO COL 6.

The FCO's argument is also plainly contradicted by a review of the HO FOF/COL. The HO FOF/COL cites, and in many cases quotes extensively from, the written and oral testimony of numerous Petitioners and Opposing Intervenor's (and the witnesses called by those parties. *See e.g.*, HO FOF 3, 758-762, 828, 915 (K. Kealoha Pisciotto); HO FOF 5, 620, 692, 811-816,

913 (E. Kalani Flores); HO FOF 5, 400-423, 823, 831 (B. Pualani Case); HO FOF 6, 559, 807-809, 871, 894, 914 (Deborah Ward); HO FOF 4, 669 (Clarence Ching); HO FOF 7, 806 (Paul Neves); HO FOF 11, 802-803, 916, 980 (Mehana Kihoi); HO FOF 12 (Chase Michael Kaho'okahi Kanuha); HO FOF 13, 1006 (Harry Fergestrom); HO FOF 14, 787, 879 (Joseph Kuali'i Lindsey Camara); HO FOF 15, 805 (Jennifer Leina'ala Sleightholm); HO FOF 16 (Maelani Lee); HO FOF 17 (Richard Maele DeLeon); HO FOF 18, 560, 798-799, 853, 873, 875, 1004-1005 (Cindy Freitas); HO FOF 19, 608, 685, 786, 800-801, 831, 876 (William Freitas); HO FOF 21, 789, 880 (Kalikolehua Kanaele); HO FOF 22 (Stephanie-Malia Tabadda); HO FOF 23, 790 (Tiffnie Kakalia); HO FOF 24 (Glen Kila); HO FOF 25, 818 (Dwight Vicente); HO FOF 26 (Brannon Kamahana Kealoha); HO FOF 342-344, 463, 731-732, 753, 852, 895, 918 (Dr. Ku Kahakalau); HO FOF 320-321, 460, 514, 736, 820, 829, 950, 1003, 1012, 1017-1026, 1028-1032 (Professor Candace Fujikane); HO FOF 896, 911-912, 1001 (Marti Townsend); HO FOF 626, 824, 868, 979 (Laulani Teale); HO FOF 1043-1046 (David Frankel); FOF 700-701, 822, 917, 974 (Professor Jonathan Osorio); HO FOF 821, 825-826 (Narissa Spies); HO FOF 490-491, 664-668, 919 (Dr. Kehaunani Abad); HO FOF 627 (Diana LaRose); HO FOF 361-368, 724-725, 866-867, 967-970 (Dr. Taulii Ku'u lei Kanahele); HO FOF 618-619, 819 (Professor Peter Mills); HO FOF 817 (Davin Vicente); HO FOF 380-393, 972-973 (Dr. Manulani Aluli Meyer); HO FOF 804 (Sara Kihoi); HO FOF 660-662 (Ruth Aloua); HO FOF 394-399, 663 (Hawane Rios); HO FOF 770-777 (Professor Gregory Johnson); HO FOF 988-991 (Nanci Munroe); HO FOF 872, 992-993 (Susan Rosier); HO FOF 796-797, 878 (Nelson Ho); HO FOF 793-795 (Professor N. Kaopua-Goodyear); HO FOF 975-977 (Professor Joseph Keaweaimoku Kaholokula); HO FOF 978 (Tammie Noelani Perreira); HO FOF 214 (Brian Cruz); HO FOF 778-782 (Prof. Mililani Trask); HO FOF 784 (Frank Nobriga); HO FOF 788 (Wiremu Carroll); HO FOF 783 (Ronald

Fujiyoshi); HO FOF 459, 791, 869 (Keahi Tajon); HO FOF 537-540, 953 (Eric Hansen); and HO FOF 628, 870 (Michael Kumukauoha Lee). Significantly, and in direct contradiction of the FCO's claim that the Hearing Officer merely cut and pasted from the UHH-TIO Joint Response to FCO Proposed FOF/COL, the vast majority of these findings were not proposed by UHH or TIO, nor included in the UHH-TIO Joint Response to FCO Proposed FOF/COL.

1. **THE TMT PROJECT SATISFIES CRITERION 1 OF HAR § 13-5-30(C).**

HAR § 13-5-30(c)(1) provides that “[t]he proposed land use is consistent with the purpose of the conservation district.” The purpose of the conservation district is “to conserve, protect, and preserve the important natural resources of the State through appropriate management *and use* to promote their long-term sustainability and the public health, safety and welfare.” Haw. Rev. Stat. § 183C-1 (emphasis added). The administrative rules for the conservation district likewise are designed “to regulate *land-use* in the conservation district for the purpose of conserving, protecting, and preserving the important natural and cultural resources of the State through appropriate management and use to promote their long-term sustainability and the public health, safety, and welfare.” HAR § 13-5-1 (emphasis added). One of the permitted land uses in the resource subzone of the conservation district is astronomy facilities. *See* HAR § 13-5-24(c); *see also Kilakila*, 138 Hawai‘i at 405, 382 P.3d at 217 (2016) (“*Kilakila*”) (recognizing that astronomy is a “specifically permitted [use] in the general subzone of the conservation district”). Consequently, and contrary to the FCO's arguments, the TMT Project is consistent with the purpose of the conservation district. The reliable, probative, and substantial record in the whole record supports the conclusion that the TMT Project satisfies HAR § 13-5-30(c)(1). *See* HO FOF 428-464; HO COL 128-141.

FCO's Exceptions to HO FOF 433-437, 439-447, 449-459, 464; COL 133-138, 140-141

[FCO's Exceptions at 13]: The FCO's Exceptions to the identified HO FOFs and HO COLs are Inaccurate/False, Not Credible, and Unsupported/Unsubstantiated. The FCO takes exception to the identified HO FOFs and HO COLs arguing that UH Hilo is not in compliance with the CMP and its Sub-Plans, the TMT Project is inconsistent with the objectives and provisions outlined in mandated plans, and the TMT Management Plan is outdated and not in compliance with HAR § 13-5 as amended in 2011. The FCO's arguments that UH Hilo is not in compliance with the CMP and its Sub-Plans and that the TMT Project is inconsistent with the objectives and provisions outlined in mandated plans have already been addressed supra and shown to be meritless. Those arguments will not be repeated here, but are instead incorporated by this reference.

The FCO argues that the TMT Management Plan is outdated and not in compliance with HAR § 13-5 as amended in 2011. Other than this general statement, however, the FCO fails to explain with any detail how the TMT Management Plan is outdated and/or not in compliance with HAR § 13-5. Such unsupported and unsubstantiated exceptions should be rejected. Moreover, as discussed *infra*, the TMT Management Plan is not outdated and is in compliance with the current version of HAR § 13-5. *See infra; see also* HO FOF 477-489; HO COL 155-160.

FCO's Exceptions to HO FOF 433-435: The FCO's Exceptions to the identified HO FOFs are Inaccurate/False, Not Credible, and a Mischaracterization of the applicable administrative rules. The TMT Project is an expressly permitted use in the resource subzone of the conservation district and therefore consistent with the purpose of the conservation district. See supra. The FCO's argument to the contrary is specious and meritless.

2. **THE TMT PROJECT SATISFIES CRITERION 2 OF HAR § 13-5-30(C).**

HAR § 13-5-30(c)(2) provides that “[t]he proposed land use is consistent with the objectives of the subzone of the land on which the use will occur.” To repeat, the TMT Project is an expressly permitted use in the resource subzone of the conservation district. *See supra*. Consequently, and contrary to the FCO’s arguments, the TMT Project is consistent with the objectives of the subzone of the land on which the use will occur. The reliable, probative, and substantial evidence in the whole record supports the conclusion that the TMT Project satisfies HAR § 13-5-30(c)(2). *See* HO FOF 465-492; HO COL 142-165.

FCO’s Exceptions to HO FOF 468, 470-474, 476, 478, 481-488, 492; COL 143, 146-150, 154, 156, 159-165 [FCO’s Exceptions at 14]: The FCO’s Exceptions to the identified HO FOFs and HO COLs are Inaccurate/False, Not Credible, Unsupported/Unsubstantiated, and a Mischaracterization of the applicable administrative rules.

Preliminarily, the amendments to the administrative rules for the conservation district were adopted by BLNR on August 12, 2011 and signed into law by the Governor of the State of Hawai‘i on November 23, 2011. The amendments became effective ten days thereafter. *See* HO FOF 467. The FCO does not take exception to HO FOF 467.

The pre-amendment version of HAR § 13-5-24(c), which was in effect when the CDUA for the TMT Project was submitted to BLNR, provided that “[a]stronomy facilities under an approved management plan” are permitted in the Resource subzone. *See* HOF FOF 474. “Management plan” was defined to mean “a comprehensive plan for carrying out multiple land uses.” *See* HO FOF 475. The FCO does not take exception to HO FOF 475.

The current version of HAR § 13-5-24(c) provides that “[a]stronomy facilities under a management approved simultaneously with the permit” are permitted in the resource subzone.

HAR § 13-5-24(c); HO FOF 479. “Management plan” means “a project or site based plan to protect and conserve natural and cultural resources.” HAR § 13-5-2; HO FOF 479. The FCO does not take exception to HO FOF 479.

The Hearing Officer found that the TMT Project complies with both versions of HAR § 13-5-24(c). *See* HO FOF 476 (noting that the CMP satisfies the requirement of a management plan under the old version) and 481 (noting that the TMT Management Plan satisfies the requirement of a management plan under the current version).

The FCO takes the position that the “existing version” of HAR § 13-5-24(c) applies. *See* FCO’s Exceptions at 14. The FCO argues, however, that the TMT Management Plan does not comply with HAR § 13-5-39 because it has not been updated “to include the requirements listed in Exhibit 3, entitled ‘Management Plan Requirements: August 12, 2011.’” (“**Exhibit 3**”) *Id.* The FCO, however, does not identify a single requirement in Exhibit 3 that needs to be updated in the TMT Management Plan. *See* FCO Exceptions at 14. The FCO therefore fails to support its claim with actual evidence from the record.

Moreover, the reliable, probative, and substantial evidence in the whole record supports the conclusion that the TMT Management Plan complies with Exhibit 3. *See generally* TMT Management Plan attached to the CDUA, Ex. R-1. For example, the TMT Management Plan includes a general description of the proposed use in satisfaction of the first requirement in Exhibit 3. *See* Ex. R-1 at 1-1 through 1-5. The TMT Management Plan also includes a project location on page 1-6 of the TMT Management Plan in satisfaction of the second requirement in Exhibit 3. *See id.* at 1-6. The TMT Management Plan also satisfies the remaining requirements in Exhibit 3. *See generally* TMT Management Plan attached to the CDUA, Ex. R-1.



The FCO's argument that the TMT Management Plan is not in compliance with the applicable administrative rules is therefore meritless. The FCO's Exceptions to the identified HO FOFs and HO COLs should be rejected.

3. **THE TMT PROJECT SATISFIES CRITERION 3 OF HAR § 13-5-30(C).**

HAR § 13-5-30(c)(3) provides that "[t]he proposed land use complies with provisions and guidelines contained in chapter 205A, HRS, entitled 'Coastal Zone Management[.]'" The TMT Project is in the Coastal Zone Management Area ("CZMA"), but not in the Special management area. HRS Chapter 205A establishes the guidelines for use of the CZMA. *See* HO FOF 493-495. The FCO does not take exception to HO FOF 493-495.

The applicable guidelines under HRS Chapter 205A largely run parallel to the purpose of the conservation district. *See* HO FOF 493. Consequently, for the same reasons that the TMT Project is consistent with the purpose of the conservation district, it is also consistent with the objectives of HRS Chapter 205A. The reliable, probative, and substantial evidence in the whole record supports the conclusion that the TMT Project satisfies HAR § 13-5-30(c)(3). *See* HO FOF 493-507; HO COL 166-177.

FCO's Exceptions to HO FOF 497-498, 500, 506, 507; COL 167, 172-173, 175-177  
[FCO's Exceptions at 15-16]: The FCO's Exceptions to the identified HO FOFs and HO COLs are Inaccurate/False, Not Credible, and Unsupported/Unsubstantiated. The FCO generally argues that the identified HO FOFs and HO COLs are "inaccurate and false for the similar reasons that the TMT project can't satisfy the other criterion such as Criterion 1, 4, 5 and 6." FCO Exceptions at 15. The reliable, probative, and substantial evidence in the record supports the conclusion that the TMT Project satisfies all eight criteria in HAR § 13-5-30(c), including criteria 1, 4, 5, and 6. *See infra; see also generally* HO FOF/COL. Consequently, the FCO's

argument that the TMT Project does not satisfy criteria 3 because it does not satisfy criteria 1, 4, 5, and 6 is meritless. It should also be noted that although the FCO argues that the cited HO FOFs are inaccurate or false, it does not explain with any detail how such HO FOFs are inaccurate or false. The FCO does not cite any evidence contradicting the HO FOFs nor does it claim that the evidence cited does not support the HO FOFs themselves. Simply stated, the FCO's Exceptions to the identified HO FOFs and HO COLs are unsupported, unsubstantiated and fail to provide the specificity required by Minute Order No. 103 and HAR § 13-1-42. The FCO's Exceptions should therefore be rejected.

4. **THE TMT PROJECT SATISFIES CRITERION 4 OF HAR § 13-5-30(C).**

HAR § 13-5-30(c)(4) provides that “[t]he proposed land use will not cause substantial adverse impact to existing natural resources within the surrounding area, community, or region.” The reliable, probative, and substantial evidence in the whole record supports the conclusion that the TMT Project will not cause substantial adverse impact to existing natural resources within the surrounding area, community, or region. *See* HO FOF 508-897; HO COL 178-221.

FCO's Exceptions to HO FOF 462, 509, 511, 513, 517-520, 524, 532; COL 179, 181-183, 187-190, 192-200, 203-205, 208-210, 219-221 [FCO's Exceptions at 16]: The FCO Exceptions to the identified HO FOFs and HO COLs are Inaccurate/False, Not Credible, and Unsupported/Unsubstantiated. The FCO generally argues that the identified HO FOFs and HO COLs are inaccurate, irrelevant, and/or misleading. The FCO, however, does not explain with any detail how any of the identified HO FOFs and HO COLs are inaccurate, irrelevant, and/or misleading. *See* FCO's Exceptions at 16. Such unsupported and unsubstantiated exceptions should be rejected. They also fail to provide the specificity required by Minute Order No. 103 and HAR § 13-1-42.

Moreover, the identified HO FOFs and HO Cols are supported by the reliable, probative, and substantial evidence in the whole record. For example, HO FOF 462 states: “White testified that because of the proposed mitigation measures the construction and operation of the TMT Project will not have a substantial adverse impact on natural resources in the area.” Id. In his written direct testimony, which the Hearing Officer cited to support HO FOF 462, Mr. White testified: “[C]onsidering the implementation of the mitigation measures committed to in the FEIS and separately through additional mitigation measures as may be imposed by the granting of the CDUA, the analyses that have been conducted for the proposed project show that it will not cause substantial adverse impact to the existing natural resources within the surrounding area, community or region.” WDT White at 7. Consequently, the citation supports and is consistent with the related finding of fact.

FCO’s Exceptions to HO FOF 565-566, 576-579 [FCO’s Exceptions at 16]: The FCO’s Exceptions to the identified HO FOF are Inaccurate/False, Not Credible, and Unsupported/Unsubstantiated. Preliminarily, UH Hilo can satisfy its burden under HAR § 13-5-30(c) through oral or documentary evidence. HRS § 91-10(1). Moreover, given the relaxed admissibility standard that applied to the CCH, UHH was not required to produce a witness to testify as to each exhibit it moved into evidence into the CCH. Indeed, the FCO moved into evidence numerous exhibits that were not testified or referred to by a witness at the CCH. Nevertheless, UHH did call Mr. White, the principal author of the CDUA, as a witness at the CCH. Mr. White testified for over two days on many of the topics in the CDUA, including cultural resources. The FCO argues that Mr. White was not credible. However, determinations of credibility are made by the trier of fact, which, in this case, was the Hearing Officer, not the

FCO. Moreover, the FCO fails to provide any actual evidence in the record disputing the credibility of Mr. White or calling into question his opinions.

The FCO argues that Richard Nees (“**Mr. Nees**”) was not familiar with the CDUA. The FCO does not provide any citation to support their argument. Moreover, Mr. Nees was not called to testify as to the CDUA. Rather, as noted above, Mr. White, the principal author of the CDUA, was called to testify as to the CDUA. Mr. Nees also affirmed under oath that his written direct testimony was true. Tr. 12/5/16 at 7:15-8:17.

The FCO also argues that Robert Rechtman (“**Mr. Rechtman**”) and his firm were not involved in the preparation of the CDUA. To repeat, Mr. White was the principal author of the CDUA and testified at the CCH. However, as stated in his written direct testimony (Ex. C-11) and confirmed during the CCH, *see infra*, Mr. Rechtman conducted and prepared several investigations and reports concerning the TMT Project site. Ex. C-11 at 1-2. Based on his investigations, Mr. Rechtman concluded that “No burials and no historic properties were found on the TMT Project site.” *Id.* at 2. HO FOF 566 details Mr. Rechtman’s extensive expertise and qualifications in the areas of archaeology and cultural resources. *See* HO FOF 566. For example, HO FOF 566 details that Mr. Rechtman “has spent 38 years in the field of archaeology, with extensive experience in archaeology in Hawai‘i.” *Id.* He has “complet[ed] more than 800 cultural resources management projects throughout the state.” *Id.* He “conducted five archaeological studies of the TMT Project site from 2013 to 2015” including “archaeological monitoring reports and archaeological field reconnaissance reports of the TMT Project site.” *Id.* Though they take exception to HO FOF 566, the FCO does not present any evidence contradicting or calling into question Mr. Rechtman’s extensive expertise and qualifications.

The FCO also speciously argues that there was a lack of consultation with Native Hawaiian cultural practitioners. Significant and appropriate consultation regarding the TMT Project has been and continues to be conducted. *See* HO FOF 222-245; Ex. R-5, Appx. D (Cultural Impact Assessment Report). Mr. Flores himself was contacted as part of the consultation for the TMT Project. *See* HO FOF 226; Tr. 1/30/17 at 214:24-215:15; Ex. A-131.

The FCO takes issue with the fact that no one from Cultural Surveys Hawaii (“CSH”) testified at CCH. UH Hilo was not required to call anyone from CSH as a witness. The FCO could have subpoenaed someone from CSH if it believed such testimony was needed. They elected not to.

Finally, the FCO failed to present, and it does not cite to any here, any reliable, probative, and/or substantial evidence during the CCH to support their claim that the “ring of shrines” on Mauna Kea would be impacted by the TMT Project. In fact, one of their witnesses, Dr. Kehaulani Abad (“**Dr. Abad**”) could not even identify where the “ring of shrines” was located. *See* Tr. 1/19/17 at 134:4-135:17.

In sum, the FCO’s Exceptions to the identified HO FOFs are Inaccurate/False, Not Credible, and Unsupported/Unsubstantiated. They should therefore be rejected.

FCO’s Exceptions to HO FOF 515-519, 552; COL 208, 212-221 [FCO’s Exceptions at 17]: The FCO’s Exceptions to the identified HO FOFs and COLs are Inaccurate/False, Not Credible, and Unsupported/Unsubstantiated. The FCO generally argues that the identified HO FOFs and COLs are inaccurate, irrelevant, and/or misleading because “the proposed TMT project has failed to provide actual measures to mitigate the substantial adverse impacts.” FCO Exception at 17. This general argument is not supported by evidentiary support in the record. The FCO provides no citations to support their general argument. The FCO also fails to explain

or specify how the identified HO FOFs and COLs are allegedly inaccurate, irrelevant, and/or misleading. Such unsupported and unsubstantiated exceptions should be rejected. The lack of specificity also fails to comply with Minute Order No. 103 and HAR § 13-1-42(b).

Mitigation measures are also clearly relevant to the approval of the TMT Project. *See* HO COL 112, 123, 206, 211-213; *see also* Ex. C-6 at 8 (Professor Callies states that the use of mitigation measures is a universally recognized and widely adopted means of lessening otherwise adverse impacts in land use projects).

The reliable, probative, and substantial evidence in the whole record also establishes that the TMT Project's proposed mitigation measures are designed to address the environmental and cultural impacts of the TMT Project and help to reduce and minimize the TMT Project's impacts. *See* HO FOF 316-345.

FCO's Exceptions to HO FOF 264, 318, 324-326, 328, 517, 640, 642, 644, 646, 834-854; COL 208, 117, 120-123, 210, 234, 236-239, 242-246, 248-249, 259 [FCO's Exceptions at 17]:

The FCO's Exceptions to the identified HO FOFs and HO COL are Inaccurate/False, Not Credible, and Unsupported/Unsubstantiated. The use of mitigation measures again is a universally recognized and widely adopted means of lessening otherwise adverse impacts in land use projects. *See supra*. Consequently, the TMT Project's mitigation measures to lessen its visual impact are clearly relevant to the approval of the TMT Project. Moreover, the FCO confuses mitigation measures with elimination. Mitigation measures are adopted to lessen otherwise adverse impacts, not eliminate them. The permitted use of astronomy facilities in the resource subzone of the conservation district would be rendered superfluous if the TMT Project was expected to eliminate, as opposed to mitigate, the visual impacts of the TMT Observatory. The reliable, probative, and substantial evidence in the whole record supports the conclusion that

the TMT Project will not have a substantial adverse impact on the visual resources of Mauna Kea. *See* HO FOF 834-854.

FCO's Exceptions to HO FOF 521-523, 645, 649-651, 653 [FCO's Exceptions at 17]:

The FCO's Exceptions to the identified HO FOFs are Inaccurate/False, Not Credible, Unsupported/Unsubstantiated, and is a Mischaracterization of the applicable law. The FCO fails to cite to any actual evidence in the record or legal authority to support their claim that the identified HO FOFs are irrelevant and/or misleading. Such unsupported and unsubstantiated exceptions should be rejected. The FCO's exceptions are also meritless. HO FOF 521 and 522 discuss some of the scientific and educational benefits from the TMT Project. Such scientific and educational benefits are clearly relevant to the approval of the TMT Project, and whether the TMT Project satisfies Criterion 4 of HAR § 13-5-30(c). *See Kilakila*, 138 Hawai'i at 403, 382 P.3d at 215. The FCO also takes exception to HO FOF 523, which states that "TIO will pay sublease rent to the University (the first developer on Mauna Kea to do so). Those funds will be used for the management of Mauna Kea through the Mauna Kea Special Management Fund, administered by OMKM." The fact that TIO will pay sublease rent, and is the first to do so, is relevant, accurate, and not misleading. The other identified HO FOFs are also relevant and accurate. *See generally* HO FOF/COL. The FCO's unsupported claims that such HO FOFs are irrelevant and misleading are therefore meritless and should be rejected.

5. **THE TMT PROJECT SATISFIES CRITERION 5 OF HAR§ 13-5-30(C).**

HAR § 13-5-30(c)(5) provides that "[t]he proposed land use, including buildings, structures, and facilities, shall be compatible with the locality and surrounding areas, appropriate to the physical conditions and capabilities of the specific parcel or parcels." The reliable, probative, and substantial evidence in the whole record supports the conclusion that the TMT

Project is compatible with the locality and surrounding areas. *See* HO FOF 898-920; HO COL 222-230.

FCO's Exceptions to HO FOF 899-913, 920; COL 223-230 [FCO's Exceptions at 17]:

The FCO's Exceptions to the identified HO FOFs and HO COLs are Inaccurate/False, Not Credible, Unsupported/Unsubstantiated, and a Mischaracterization of the applicable law. The TMT Project is proposed to be located on an approximately five-acre site within the astronomy precinct of the MKSR, which is a clearly defined, highly specialized area set aside specifically for astronomical facilities, and was first leased to the University of Hawai'i in 1968 for this express purpose. *See* HO FOF 900. The astronomy precinct was created to consolidate astronomy development on Mauna Kea and to maintain a close grouping of astronomy facilities, roads and support infrastructure. *See* Ex A-48 at IX-20. It was intended to "minimize[] the potential impact to the natural and cultural resources of the summit region." *Id.* The astronomy precinct was created well before the Hawaii Supreme Court's recent decision in *Kilakila*.

Criterion 5 of HAR § 13-5-30(c) states that "[t]he proposed land use, including buildings, structures, and facilities, shall be compatible with the locality and surrounding areas, appropriate to the physical conditions and capabilities of the specific parcel or parcels." *Id.* In *Kilakila*, the Hawai'i Supreme Court noted that BLNR in approving the CDUA for the DKIST on Haleakala, had "necessarily interpreted 'locality and surrounding areas' as the areas within the HO site." *Id.* at 406, 382 P.3d at 218. The HO site was a specific area on Haleakala that was set aside in 1961 by Governor Quinn to be used specifically for astronomical observatories. It was the only site on Haleakala where there were astronomical observatories and had been the home of such facilities since 1951. The Hawaii Supreme Court also noted that the HO site had already been "considerably developed by the construction of numerous observatories and other astronomical



research facilities.” *Id.* at 406-407, 382 P.3d at 218-219. Because of these factors, the Hawaii Supreme Court found that BLNR did not err in interpreting “locality and surrounding areas” to be the HO site.

Like BLNR in *Kilakila*, the Hearing Officer interpreted “locality and surrounding areas” to be the astronomy precinct, which is Mauna Kea’s equivalent to the HO site. The astronomy precinct was created as part of the 2000 Master Plan to consolidate astronomy development on Mauna Kea and to minimize the potential impact to the natural and cultural resources of the summit region. Before and since its creation, the astronomy precinct has been home to astronomical observatories and facilities. The astronomy precinct is also fully or substantially developed as many of the Petitioners, Opposing Intervenors, and their witnesses admitted during the CCH. *See* HO FOF 812 (Mr. Flores acknowledged that the astronomy precinct is “substantially developed”). Consequently, the Hearing Officer’s interpretation of the “locality and surrounding areas” to mean the astronomy precinct is consistent with the Hawaii Supreme Court’s recent decision in *Kilakila*. There is also reliable, probative, and substantial evidence in the record to support the conclusion that the TMT Project is “compatible” with Criterion 5 of HAR § 13-5-30(c). *See* HO FOF 898-920; HO COL 222-230.

The TMT Observatory will also take up just five acres of the 2,000 acre Northern Plateau. *See* HO FOF 842. Moreover, contrary to the FCO’s characterization of the Northern Plateau as pristine, SMA roads and facilities are already located on the Northern Plateau. *Id.* Finally, the reliable, probative, and substantial evidence in the record supports the fact that the Northern Plateau was chosen in large part to avoid the most culturally sensitive areas of the summit ridge. *See* HO FOF 318

[FCO's Exceptions at 18-19: The FCO's Exceptions to the identified HO FOFs and HO COLs are Inaccurate/False, Not Credible, Unsupported/Unsubstantiated, and a Mischaracterization of the applicable law. The FCO argues that counsel for UH Hilo and TIO somehow "manipulate[d] responses in the cross examination to have witnesses testify the astronomy precinct is overdeveloped with existing telescopes." FCO Exceptions at 19. Such an allegation by the FCO is completely baseless. For example, the testimony from Deborah Ward that the Hearing Officer quotes from in HO FOF 914 is in response to a question asked by Cindy Freitas, not counsel for UH Hilo and TIO. *See* Tr.1/31/17 at 109:4-7. Moreover, as to Mr. Flores, he answered affirmatively to the question of whether he considered the astronomy precinct substantially developed. Tr. 1/30/17 at 234:5-8. There was no manipulation by counsel.

The FCO argues that the creation of the astronomy precinct is in violation of HAR § 13-5-30(c)(7). The FCO provides no legal support for this specious argument. The creation of the astronomy precinct is not a subdivision of lands and there was absolutely no evidence presented, and the FCO does not point to any, to support this specious argument.

It should also be noted that the FCO argues that, as to some of the other criteria in HAR § 13-5-30(c), the entire MKSR or the entire Mauna Kea Summit Region Historic District ("MKSRHD") needs to be considered in evaluating whether the TMT Project can be approved. However, in terms of the open space characteristic or the "locality and surrounding areas[.]" the FCO argues that the area to be considered is limited to the specific five acre location of the TMT Observatory on the Northern Plateau. In other words, when it fits its argument, the FCO argues that the entire Region or District needs to be considered. But when it does not fit its argument, then the FCO argues that just the limited area where the TMT Observatory is to be located

should be considered. The FCO cannot have it both ways. In evaluating the open space characteristic or the “locality and surrounding areas[,]” the appropriate area to be considered is the astronomy precinct.

6. **THE TMT PROJECT SATISFIES CRITERION 6 OF HAR § 13-5-30(C).**

HAR § 13-5-30(c)(6) provides that “[t]he existing physical and environmental aspects of the land, such as natural beauty and open space characteristics, will be preserved or improved upon, whichever is applicable.” The reliable, probative, and substantial evidence in the whole record supports the conclusion that the TMT Project complies with HAR § 13-5-30(c)(6). *See* HO FOF 921-955; HO COL 231-260.

FCO’s Exceptions to HO FOF 921-955; COL 232-246, 248-249, 251-254, 256-260

[FCO’s Exceptions at 20]: The FCO’s Exceptions to the identified HO FOFs and HO COLs are Inaccurate/False, Not Credible, Unsupported/Unsubstantiated, and a Mischaracterization of the applicable administrative rules. The TMT Project again is an expressly permitted use in the resource subzone of the conservation district. Consequently, the FCO’s interpretation of HAR § 13-5-30(c)(6) to categorically exclude astronomy facilities and only permit actions like “invasive species removal, replanting of native species, protective fencing, or erecting culturally appropriate ahu or lele” would lead to absurd results and would render the language identifying astronomy facilities as a permitted use in the resource subzone of the conservation district superfluous.

UH-Hilo and TIO have already responded to the FCO’s arguments regarding mitigation measures and the 2000 Master Plan at length. *See supra*. Those responses are incorporated by this reference.

7. **THE TMT PROJECT SATISFIES CRITERION 7 OF HAR § 13-5-30(C).**

HAR § 13-5-30(c)(7) provides that “[s]ubdivision of land will not be utilized to increase the intensity of land uses in the conservation district.” The reliable, probative, and substantial evidence in the whole record supports the conclusion that the TMT Project complies with HAR § 13-5-30(c)(7). *See* HO FOF 956-965; HO COL 261-276.

FCO’s Exceptions to HO FOF 956-959, 961-965; COL 262, 265-270, 272-276 [FCO’s Exceptions at 21]: The FCO’s Exceptions to the identified HO FOFs and HO COLs are Inaccurate/False, Not Credible, Unsupported/Unsubstantiated, and a Mischaracterization of the applicable law and administrative rules. The reliable, probative, and substantial evidence in the whole record establishes that the TMT Project does not utilize a subdivision of land to increase the intensity of land uses in the Conservation District. *See* HO FOF 956-965; COL 261-276. The mere fact that the TMT Sublease included a survey, map, and legal description of the subleased area does not render it a subdivision of land. Indeed, the FCO fails to provide any legal authority supporting its argument.

The FCO also does not provide any legal support for its argument that the creation of the astronomy precinct is in violation of HAR § 13-5-30(c)(7). The creation of the astronomy precinct is not a subdivision of lands and there was absolutely no evidence presented, and the FCO does not point to any, to support this specious argument. The FCO also provides no explanation as to why the Hawaii County Code 23-2 (1983), which is entitled Subdivisions, and HRS § 484-1 (2008), which contains a statutory definition of subdivision, are irrelevant or inapplicable. Ironically, the FCO cites favorably to the same Hawaii County Code in their Exceptions. *See* Exceptions at 23 n. 6.

The Hearing Officer was also correct in rejecting FCO FOFs 724-734. The reliable, probative, and substantial evidence in the record establishes that the TMT Project does not utilize a subdivision of land to increase the intensity of land uses in the Conservation District. Mr. Flores is not a land use expert and therefore his own biased testimony on the issue is not credible, especially in comparison to the testimony of Professor David Callies (“**Professor Callies**”), one of the foremost recognized experts in planning and land use in Hawai‘i. *See* Ex. C-6 at 9 (Professor Callies stated that there is no subdivision of land as a result of the TMT Project).

8. **THE TMT PROJECT SATISFIES CRITERION 8 OF HAR § 13-5-30(C).**

HAR § 13-5-30(c)(8) provides that “[t]he proposed land use will not be materially detrimental to the public health, safety, and welfare.” The reliable, probative, and substantial evidence in the whole record supports the conclusion that the TMT Project complies with HAR § 13-5-30(c)(8). *See* HO FOF 966-1016; HO COL 277-297.

FCO’s Exceptions to HO FOF 434-435, 457, 966, 970, 973, 976-978, 981-982, 999, 1008-1011, 1013-1016; COL 278-285, 287-297 [FCO Exceptions at 23-25]: The FCO’s Exceptions are Inaccurate/False, Not Credible, Unsupported/Unsubstantiated, and a Mischaracterization of the applicable law and administrative rules. The FCO argues that economic benefits from the TMT Project cannot be considered because public welfare is limited to aesthetics or natural beauty. *See* FCO’s Exceptions at 24. The FCO is incorrect. The Hawaii Supreme Court held in *Kilakila*:

[T]here is no regulation suggesting that BLNR could not consider [scientific, economic, and educational] benefits related to HAR § 13-5-30(c) when approving a permit. HAR § 13-5-30(c) states, “In evaluating the merits of a proposed land use, the department or board shall apply the following criteria[.]” *but the statute and agency regulations concerning conservation districts do not*

*suggest that scientific, economic, and education benefits are not relevant. Rather, they suggest the opposite.*

The purpose of HAR § 13-5-30(c) and the other conservation district regulations is “to regulate land-use in the conservation district for the purpose of conserving, protecting, and preserving the important natural and cultural resources of the State through appropriate management and use to promote their long-term sustainability and the public health, safety, and welfare.” HAR § 13-5-1 (1994).

\* \* \*

BLNR is therefore unequivocally tasked with protecting natural and cultural resources through “appropriate management and use to promote their long-term sustainability and the public health, safety, and welfare.” HRS § 183C-1; HAR § 13-5-1. *The consideration of relevant scientific, economic, and educational benefits of the ATST within the context of the HO does not conflict with this, as the benefits impact long term sustainability and public welfare.*

Id. at 405-406, 382 P.3d at 217-218 (citations omitted) (emphases added).

Consequently, the applicable law clearly holds that economic benefits of the TMT Project are relevant and should be considered. The FCO cites to a Conservation District Review Project, Preliminary Discussion Draft that was prepared for the DLNR in November 1993 to support its argument. Though the Preliminary Discussion Draft notes that “[t]he concept of welfare was added to include the notion of aesthetics – preserving Hawaii’s unique natural beauty[,]” it does not state that that it is limited to the notion of aesthetics nor does it state that was the intent of the Legislature when it adopted HRS § 13-5-30(c). Indeed, if the Legislature intended to limit public welfare to a “notion of aesthetics[,]” it could have explicitly done so. It did not.

Moreover, contrary to the FCO’s arguments, the scientific, economic, and educational benefits of the TMT Project are clear and supported by the reliable, probative, and substantial evidence in the whole record. *See* HO FOF 273-315.

The FCO argues, without supporting citations to the record, that the evidence established that the TMT Project would be detrimental to the health of many Native Hawaiians.

Preliminarily, HAR § 13-5-30(c)(8) is concerned with the entire public's health, not just Native Hawaiians. More importantly, however, the reliable, probative, and substantial evidence in the record established that it would be entirely speculative to conclude, in light of the historical issues affecting Native Hawaiian health and welfare in general, that the TMT Project, in and of itself, is or will be materially detrimental to the health, safety and welfare of the public. *See* HO COL 288; *see also* HO FOF 966-1016; HO COL 277-297.

**D. The CDUA is not deficient. [FCO's Exceptions at 25-44].**

Preliminarily, the FCO states that they are “only responding to a few examples of blatant inaccuracies pertaining to deficiencies” in the CDUA. FCO Exceptions at 25. This was the FCO's opportunity to raise any exceptions it had to the HO FOF/COL. To the extent that they have not raised certain exceptions, those exceptions should be deemed waived. *See* HAR § 13-1-42.

FCO's Exceptions to HO COL 431-433 [FCO's Exceptions at 25-26]: The FCO's Exceptions are Inaccurate/False, Not Credible, and Unsupported/Unsubstantiated. The TMT Sublease, which was moved into evidence by the FCO as Exhibit B.02f, is an agreement between the University of Hawaii and TIO. Page 3, Paragraph 4, of the TIO Sublease specifically states that “[t]he construction and operation of the Subleased Premises shall be conducted in strict compliance with the terms and conditions of . . . any amended or subsequent Conservation District Use Permit.” *Id.* This paragraph alone clearly demonstrates that TIO will be subject to the terms and conditions of the CDUP, if granted.

The FCO also does not provide any legal support for their specious claims that the CDUA needs to be revised and/or updated to reflect the change from the TMT Corporation to TIO. Consequently, the FCO has failed to support their exceptions to HO COL 431-433.

The FCO next lists certain proposed FOFs from the FCO Proposed FOF/COL that they believe the Hearing Officer should have included in the HO FOF/COL. UH-Hilo and TIO already responded to the identified proposed FOFs in the UHH-TIO Joint Response to FCO Proposed FOF/COL. For the convenience of the BLNR, UH-Hilo and TIO repeat those responses in the below table:

<b>Proposed FOF/COL #</b>	<b>UH Hilo and TIO Response</b>
509	<p>The evolution from TMT Corporation to TIO was explained in detail in UH-TIO FOF ¶¶206-207 and respectfully should be adopted. Moreover, as explained in the UH-TIO FOF/COL, UHH, as the applicant of the CDUA, was not required to resubmit the CDUA, reapply, or otherwise amend the CDUA to reflect the creation of TIO or the change from TMT Corporation to TIO. <u>See</u> UH-TIO FOF ¶¶420-426. The Flores-Case Ohana does not cite to any legal authority that states otherwise.</p> <p>The TIO Sublease, Ex. B.02f, which was moved into evidence by the Flores-Case Ohana, UH-TIO FOF ¶209, clearly demonstrates that TIO is to be subject to the terms and conditions of the CDUP, if granted. <u>See id.</u> at 3, ¶4.</p>
510	<u>See</u> response to proposed finding of fact 509 above.
511	<u>See</u> response to proposed finding of fact 509 above.

The FCO next argues that the CDUA is deficient because it allegedly fails to “properly address the projects impacts upon the Mauna Kea Summit Region Historic District, Traditional Cultural Properties (“TCP”), various historic and cultural properties, and Native Hawaiian traditional customary practices and rights.” FCO Exceptions at 26. The FCO is simply incorrect. The potential impacts of the TMT Project on the MKSRHD and the Kukahau‘ula TCP are disclosed and discussed in the CDUA. *See e.g.*, Ex. R-1 at 2-6 (The TMT Project “would have minimal adverse impact on the character of the District.”); Ex. R-1 at 4-1 through 4-5; *id.* at



4-7 (discussing impacts on pilgrimage, prayer, shrine construction, and offerings in the “summit region, which includes the [MKS RHD] and the Kukahau‘ula TCP”); TMT Management Plan, Ex. B to R-1 at 3-13. The CDUA also discusses the impact that the TMT Project may have on historic and cultural properties and Native Hawaiian traditional customary practices and rights on Mauna Kea. *See e.g.*, Ex. R-1 at 4-1 through 4-9.

The FCO also speciously argues that the CDUA omitted consultation with Native Hawaiian practitioners. Significant and appropriate consultation regarding the TMT Project has been and continues to be conducted. *See* HO FOF 222-245; Ex. R-5, Appx. D (Cultural Impact Assessment Report). Indeed, the FCO through Mr. Flores was contacted as part of the consultation for the TMT Project. *See* HO FOF 226; Tr. 1/30/17 at 214:24-215:15; Ex. A-131.

FCO’s Exceptions to HO FOF 601-617, 622-625, 632-633, 638-639 [FCO Exceptions at 27]: The FCO’s Exceptions to the identified HO FOFs are Inaccurate/False, Not Credible, and Unsupported/Unsubstantiated. The FCO continues with their unsupported and baseless exceptions. The FCO takes exception to the identified HO FOFs claiming they are inaccurate and misleading because the CDUA failed to properly assess project impacts upon the historic and cultural properties. The CDUA did discuss the impact that the TMT Project may have on historic and cultural properties. *See* Ex. R-1 at 4-1 through 4-9. The FCO also again argue that there was insufficient consultation with Native Hawaiian cultural practitioners. Significant and appropriate consultation regarding the TMT Project has been and continues to be conducted. *See* HO FOF 222-245; Ex. R-5, Appx. D. Indeed, the FCO through Mr. Flores was contacted as part of the consultation for the TMT Project. *See* HO FOF 226; Tr. 1/30/17 at 214:24-215:15; Ex. A-131.

FCO's Exceptions to HO FOF 581-582, 586, 588-591, 593-598, 640 [FCO's Exceptions at 27]: The FCO's Exceptions to the identified HO FOFs are Inaccurate/False, Not Credible, and Unsupported/Unsubstantiated. It is unclear if the FCO is even taking exception to the foregoing HO FOFs. Nevertheless, the foregoing HO FOFs make it clear that the Hearing Officer heard and reviewed evidence regarding the MKSRHD and TCPs. The potential impacts of the TMT Project on the MKSRHD and the Kukahau'ula TCP are also disclosed and discussed in the CDUA. *See supra*. Simply stated, the CDUA adequately addresses the potential impacts of the TMT Project on the cultural resources on Mauna Kea. The FCO's argument to the contrary is unsupported and meritless.

FCO's Exceptions to HO FOF 620-621 [FCO's Exceptions at 27]: The FCO's Exceptions to the identified HO FOFs are Inaccurate/False, Not Credible, and Unsupported/Unsubstantiated. The CDUA, again, did discuss the potential impacts of the TMT Project on the historic properties and cultural resources in the MKSRHD. *See supra*. Consequently, any claim to the contrary by the FCO, Dr. Mills, Dr. Abad, Ms. Aloua, or anyone else for that matter, is not accurate and not supported by the record. The FCO's attempts to create an issue through the Archaeological Inventory Survey for the Thirty-Meter Telescope ("TMT AIS") are also misplaced. The TMT AIS was reviewed and approved by the State Historic Preservation Division ("SHPD") on January 27, 2011. *See Ex. A-66*. There is no requirement, and the FCO does not cite to one, which required UH Hilo to submit the TMT AIS as evidence in this case (especially where a draft was already appended to the FEIS). Nevertheless, BLNR may take official notice of the TMT AIS pursuant to HAR § 13-1-35(i). It should also be noted that SHPD reviewed the CDUA and stated that "[t]he information provided

in the application regarding archaeological sites in the vicinity of the project area locations is correct and accurate.” Ex. A-137.

FCO Exceptions to HO FOF 662-670 [FCO Exceptions at 28]: The FCO’s Exceptions to the identified HO FOFs are Inaccurate/False, Not Credible, and Unsupported/Unsubstantiated. The FCO continues with their unsupported and baseless exceptions. Indeed, though it takes exception to the identified HO FOFs, and argues that such HO FOFs are inaccurate and/or misleading, the FCO fails to cite to any evidence that contradicts or is inconsistent with the identified HO FOFs. The fact of the matter is that the identified HOF FOFs are supported by the reliable, probative, and substantial evidence in the record. For example, it is undisputed that Dr. Abad placed great emphasis on Bulletin 38 (Ex. B.01i) as she testified to as much during the CCH. *See* Tr. 1/19/17 at 25:15-37:20; 40:4-10. It is likewise undisputed that Bulletin 38 plainly states that “the fact that [a property] is significant does not mean that it cannot be disturbed, or that the project must be foregone.” Ex. B.01j at 4.

FCO’s Exceptions to HO FOF 632 [FCO’s Exceptions at 28]: The FCO’s Exceptions to the identified HO FOFs are Inaccurate/False, Not Credible, and Unsupported/Unsubstantiated. Simply stated, there was no manipulation. Figure 4.1 of the CDUA identifies the historic properties that are within the Astronomy Precinct. This is consistent with the *Kilakila* decision. Figure 4.1 also identifies those Historic Properties that are in the vicinity of other TMT Project area and that are in the culturally significant areas of Pu‘u Poliahu and Pu‘u Wekiu. In comparison, Figure 5.1 to the Archaeological Inventory Survey for the Astronomy Precinct in the MKSR, which was attached to the FEIS, identifies historic properties *and* find spots in the Astronomy Precinct and surrounding areas. Both figures are clearly labeled and both figures

were produced as evidence in the CCH. There was no attempt to manipulate or hide Figure 5.1 as alleged by the FCO.

The FCO next lists certain proposed FCO FOFs from the FCO Proposed FOF/COL that it believes the Hearing Officer should have included in the HO FOF/COL. UH-Hilo and TIO have already responded to the FCO FOFs in the UHH-TIO Joint Response to FCO Proposed FOF/COL. For the convenience of the BLNR, UH-Hilo and TIO repeat those responses in the below table:

Proposed FOF/COL #	UH Hilo and TIO Response
531	<p>HRS § 6E-42(a) requires that “[b]efore any agency or officer of the State or its political subdivisions <b><u>approves any project involving a permit</u></b> . . . , which may affect historic property, aviation artifacts, or a burial site, the agency or office shall advise [SHPD] and <b><u>prior to any approval</u></b> allow the department an opportunity for review and comment on the effect of the proposed project on historic properties, aviation artifacts, or burial sites.” (Emphases added).</p> <p>In accordance with HRS § 6E-42(a), the Draft Historic Preservation Mitigation Plan that is attached as Exhibit B to the TMT Management Plan was reviewed and approved by SHPD on December 1, 2010. <u>See</u> Ex. A-137 (stating that SHPD had “no further comments at this time [regarding the CDUA], with the assumption that the project will follow the Historic Preservation Mitigation Plan [which SHPD acknowledged was identified as a draft in the CDUA] and other pertinent historic preservation planning documents associated with the Mauna Kea Science Reserve, such as the Cultural Resources Management Plan that is attached to the Comprehensive Management Plan”).</p> <p>Consequently, in accordance with HRS § 6E-42(a), SHPD has reviewed and approved the Draft Historic Mitigation Plan prior to any approval of the CDUA.</p>
532	<p><u>See</u> response to proposed finding of fact 531 above. The Archaeological Inventory Survey for the Thirty-Meter Telescope (TMT) Observatory was reviewed and approved by SHPD on January 27, 2011. <u>See</u> Ex. A-66. Consequently, in accordance with HRS § 6E-42a, SHPD has reviewed and approved the Archaeological Inventory Survey for the Thirty-Meter Telescope (TMT) Observatory prior to any approval of the CDUA. The Flores-Case Ohana does not cite to any authority that required SHPD approval prior to the submission of the CDUA.</p>
533	<p><u>See</u> response to proposed finding of fact 532 above.</p>
534	<p>In its review of the CDUA, SHPD stated the following:</p> <p>“Project specific archaeological inventory surveys have been completed for this</p>

Proposed FOF/COL #	UH Hilo and TIO Response
	<p>project, and drafts were reviewed by our office in 2009. Subsequent to our review, revised reports have been submitted and are attached to the FEIS. IN addition, the archaeological inventory survey of the Mauna Kea Science Reserve was completed and accepted by our office in 2009. <b><u>We therefore believe that the information provided in the application regarding archaeological sites in the vicinity of the project area locations is correct and accurate.</u></b></p> <p>Ex. A-137 (emphasis added).</p> <p>Unsupported/Unsubstantiated. The Flores-Case Ohana does not provide any evidence to support this proposed finding of fact.</p>
535	<p><u>See</u> response to proposed finding of fact 534 above. “[T]he information provided in the application regarding archaeological sites in the vicinity of the project area locations is correct and accurate.” Ex. A-137. UHH was not required to submit the Archaeological Inventory Survey for the Thirty-Meter Telescope (TMT) Observatory as evidence in this case. If the Flores-Case Ohana believed it was inaccurate or should have been considered in this CCH, they could have submitted the survey as evidence. They chose not to. Moreover, if the Hearing Officer believes it is necessary, she can take official notice of the survey pursuant to HAR § 13-1-35(i).</p>
536	<p>TIO’s Initial Decommissioning Funding Plan was admitted into evidence in the CCH as Ex. C-39. It is dated April 2014. There is no requirement, and the Flores-Case Ohana points to none, that required this Funding Plan to be included in the CDUA.</p>
537	<p>Misleading. Presented out of context. Unsupported/Unsubstantiated. The Flores-Case Ohana does not cite to any requirement that the DFP should have been provided to OMKM prior to 2014.</p>
538	<p><u>See</u> response to proposed finding of fact 531 above.</p>
539	<p><u>See</u> response to proposed finding of fact 532 and 534 above.</p>
540	<p>Inaccurate/False as demonstrated in the responses to the following proposed findings of fact. The responses to the following proposed findings of fact are specifically incorporated herein by this reference.</p>
541	<p><u>See</u> response to proposed finding of fact 285 above.</p> <p>The TMT Project “would have minimal adverse impact on the character of the District.” Ex. R-1 at 2-6.</p> <p>Flores’ biased testimony is also contradicted by the credible and substantial evidence presented that it was found, after extensive consultation, that there are no known ahu (other than those that were erected after or in protest of the TMT Project) or historical features near the TMT Project area. <u>See</u> UH-TIO FOF ¶¶342.c; 629.</p> <p>The MKSRHD is not listed on the National Register of Historic Places. <u>See</u></p>

Proposed FOF/COL #	UH Hilo and TIO Response
	UH-TIO FOF ¶522 (citing Ex. A-1/R-1 at 4-3).
542	<u>See</u> response to proposed finding of fact 541 above.
543	<p><u>See</u> response to proposed finding of fact 541 above.</p> <p>Inaccurate/False. The Flore-Case Ohana rely solely on the biased testimony of Mr. Flores, which is clearly inaccurate. The potential impacts of the TMT Project on the MKSRHD and the Kukahau‘ula TCP are disclosed and discussed in the CDUA. <u>See e.g.</u>, Ex. R-1 at 2-6 (The TMT Project “would have minimal adverse impact on the character of the District.”); Ex. R-1 at 4-1 through 4-5; <u>id.</u> at 4-7 (discussing impacts on pilgrimage, prayer, shrine construction, and offerings in “summit region, which includes the [MKSRHD] and the Kukahau‘ula TCP); TMT Management Plan, Ex. B to R-1 at 3-13.</p> <p>The MKSRHD and significance criteria were also addressed and discussed during this CCH. <u>See e.g.</u>, UH-TIO FOF ¶¶529-542.</p>
544	Not in dispute to the extent the document speaks for itself.
545	<p>Inaccurate/False. The Flores-Case Ohana rely solely on the biased testimony of Mr. Flores, which is clearly inaccurate. There is credible and substantial evidence in the record that the CDUA including the documents attached thereto do assess the impacts of the TMT Observatory upon the Astronomy Precinct, including the northern plateau. <u>See e.g.</u>, UH-TIO FOF ¶¶306, 308, 342.c., 641, 681, and 783.</p> <p>Mr. Flores himself also conceded during cross-examination that the Astronomy Precinct, which includes the northern plateau, was “substantially developed.” Tr. 1/30/17 at 234:5-8. The Northern Plateau also includes roads and facilities for the Submillimeter Array. <u>See</u> UH-TIO FOF ¶783.</p>
546	<p>Not credible. Dr. Kehau Abad’s testimony was not credible given her clear and demonstrated personal bias, her admittedly incomplete review of the relevant documents, and her multiple statements that were clearly contradicted by the record. <u>See e.g.</u>, UH-TIO FOF ¶¶604-608. For example, Dr. Abad conceded that the CDUA did in fact address areas of concern outside of the TMT Project area, but within the MKSRHD or her “regional perspective”, including Lake Waiau and Kūkahau‘ula. Tr. 1/19/17 at 129:14-133:21. Dr. Abad also admitted that she did not review <u>Kilakila O Haleakala</u>, which affirmed that BLNR may focus its analysis on the permitted land use within the context of a specific area within a Conservation District designated for similar uses – <u>e.g.</u>, the Astronomy Precinct. <u>See</u> UH-TIO FOF ¶120. Dr. Abad’s testimony should be given no weight.</p>
547	<u>See</u> response to proposed finding of fact 546 above.
548	<u>See</u> response to proposed finding of fact 546 above.
549	<u>See</u> response to proposed finding of fact 546 above.

<b>Proposed FOF/COL #</b>	<b>UH Hilo and TIO Response</b>
550	<u>See</u> response to proposed finding of fact 546 above.
551	<u>See</u> response to proposed finding of fact 546 above.
552	<u>See</u> response to proposed finding of fact 546 above.
553	<u>See</u> response to proposed finding of fact 546 above.
554	<u>See</u> response to proposed finding of fact 546 above. This is also contradicted by the substantial and credible evidence in this case that there are no known ahu (other than those that were erected after or in protest of the TMT Project) or historical features near the TMT Project area, <u>see</u> UH-TIO FOF ¶¶342.c; 629, and that the TMT Project “would have minimal adverse impact on the character of the District.” Ex. R-1 at 2-6.
555	<u>See</u> response to proposed finding of fact 546 above.
556	Not credible. The testimony of Dr. Peter Mills was not credible given his admittedly incomplete review of the relevant documents and his multiple statements that were clearly contradicted by the record. <u>See</u> UH-TIO FOF ¶559. For example, Prof. Mills admitted that he had not read the CDUA and the FEIs in their entirety. Tr. 1/25/17 at 130:9-132:3. Prof. Mills also testified under oath that SHPD sites 16169 and 21447 were omitted from the CDUA. On cross-examination, Prof. Mills conceded that both sides were included in the CDUA. Tr. 1/25/17 at 152:1-153:7; Ex. R-1 at Fig. 4.1. Prof. Mills also admitted that he had not read <u>Kilakila O Haleakala</u> . Tr. 1/25/17 at 147:21-24. Prof. Mills’ testimony should be given no weight.
557	<u>See</u> response to proposed finding of fact 556 above.
558	<u>See</u> response to proposed finding of fact 556 above.
559	<u>See</u> response to proposed finding of fact 556 above.
560	<u>See</u> response to proposed finding of fact 556 above.  This CCH is about the approval of a CDUA under the eight criteria set forth in HAR § 13-5-30(c), not an EIS under HRS Chapter 343. The time to comment on and challenge the EIS has passed. In fact, Prof. Mills commented on the DEIS for the TMT Project and described the DEIS as “ha[ving] been professionally prepared.” Ex. R-4 at 343 of 531. Prof. Mills conflates the requirements of HRS Chapter 343 with HAR § 13-5-30(c).
561	<u>See</u> responses to proposed findings of fact 556 and 560 above.
562	Not credible. Ms. Aloua’s testimony was not credible given her clear and demonstrated personal bias, her admittedly incomplete review of the relevant documents, and her multiple statements that were clearly contradicted by the record. <u>See e.g.</u> , UH-TIO FOF ¶602. For example, Ms. Aloua admitted that she did not review the CDUA, FEIS, or their incorporated documents in depth, nor did she review the archaeological studies conducted for the MKSR and the

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	Astronomy Precinct. Tr. 2/14/17 at 202:22-203:1, 206:11-15; Tr. 2/15/17 at 66:3-86:4. Ms. Aloua's testimony should be given no weight.
563	Citation does not support the proposition. There is no transcript from 4/3/17. Moreover, as noted in the above responses, and as demonstrated in the credible and substantial evidence in the record, the TMT Project did consider potential impacts to the MKSRHD and found that the TMT Project "would have minimal adverse impact on the character of the District." Ex. R-1 at 2-6.
564	<p>Citation does not support the proposition. There is no transcript from 4/3/17.</p> <p>Misrepresentation. Mr. Nees testified that he was not aware if his firm, PCSI, conducted a viewplane analysis of the historic properties or find spots within or outside the Astronomy Precinct in relationship to the TMT Project. <u>See</u> Tr. 12/5/16 at 102:14-103:7.</p> <p>The credible and substantial evidence in the record establishes that an extensive analysis of viewplanes was conducted in connection with the TMT Project. <u>See</u> UH-TIO FOF ¶¶775-795; WDT Hayes at 2-17. The Flores-Case Ohana has not presented any credible evidence that the viewplanes from any other alleged historic properties or find spots would be impacted by the TMT Project. To the extent Mr. Flores had any such information, he could have, but refused or declined to, provide such information during the EIS process. <u>See</u> UH-TIO FOF ¶216; Tr. 1/30/17 at 222:3-22.</p> <p><u>See</u> response to proposed finding of fact 564 above.</p> <p><u>See</u> response to proposed finding of fact 564 above.</p>
565	<u>See</u> response to proposed finding of fact 564 above.
566	<u>See</u> response to proposed finding of fact 564 above.
567	<p>Citation does not support the proposition. There is no transcript from 4/3/17.</p> <p>Mischaracterization. Misrepresentation. Mr. Nees testified that, in general, cultural practitioners are not out in the field with them when they are doing the field work for archaeological inventory surveys. <u>See</u> Tr. 12/5/16 at 109:18-110:2. Mr. Nees did not refer to any specific project or area. <u>See id.</u></p>
568	Not in dispute.
569	Not credible. Significant and appropriate consultation regarding the TMT Project has been and continues to be conducted. <u>See e.g.</u> , FOF ¶¶210-237; Ex. R-5, Appx. D (Cultural Impact Assessment Report)
570	Unsupported/Unsubstantiated. The Flores-Case Ohana fails to present any actual or independent evidence to support this proposed finding of fact. They only present the biased testimony of Mr. Flores, which also fails to provide any



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	specifics, maps, or photographs, regarding the alleged location of these cultural sites, their alleged functions, and relationships to each other. The Flores-Case Ohana's claim that these alleged cultural sites will be affected by the TMT Project is also unsupported and unsubstantiated.
571	<u>See</u> response to proposed finding of fact 570 above. "[T]he information provided in the application regarding archaeological sites in the vicinity of the project area locations is correct and accurate." Ex. A-137.
572	<u>See</u> response to proposed finding of fact 570 and 571 above.
573	Citation does not support the proposition. Nevertheless, the quoted language, which the Flores-Case Ohana concedes is a "guideline[.]" states: "Minimum visual impact from significant cultural areas." First, it does not state no visual impact. It also says from "significant cultural areas." The credible and substantial evidence in the record establishes that an extensive analysis of viewplanes was conducted in connection with the TMT Project. <u>See</u> UH-TIO FOF ¶¶775-795; WDT Hayes at 2-17. Indeed, as testified to by Mr. Hayes, this in-depth viewplane analysis included viewplanes from "culturally significant areas" such as the summit of Mauna Kea, Lake Waiau, Pu'u Poliahu, the northern plateau, and the northern ridge of Kukahau'ula. <u>See</u> WDT Hayes at 15-17. For example, the viewplane analysis from Pu'u Poliahu concluded that the TMT Observatory, because of its location, lower elevation, and its reduced height, would not block the view of Maui from the northern ridge or Pu'u Poliahu. <u>See id.</u> at 17; <u>see also</u> Ex. C-19.
574	Inaccurate/False. <u>See</u> response to proposed finding of fact 573 above.
575	Not credible. Dr. Abad was not credible and her testimony should not be given any weight. <u>See</u> response to proposed finding of fact 546 above. Dr. Abad did not identify any alleged upright sites or ahu that would be impacted by the TMT Project.
576	Not credible. Dr. Abad was not credible and her testimony should not be given any weight. <u>See</u> response to proposed finding of fact 546 above. Dr. Abad also did not identify any alleged viewplanes that she believed would be blocked by the TMT Observatory.
577	Inaccurate/false. Not credible.  Mr. Flores testified under oath that the Cдуа "omitted any reference" to SIHP Site Nos. 16169 and 21447. Tr. 1/30/17 at 236:14-239:7. On cross-examination, Mr. Flores conceded that Figure 4.1 of the Cдуа does refer to both sites. <u>See id.</u> ; Ex. R-1 at Figure 4.1.  The FEIS also discusses and assesses the impacts to cultural, archaeological, and historic resources. <u>See</u> Ex. R-3 at 3-192 through 3-193. The FEIS concluded that "[o]verall, through compliance with existing rules and policies, Project construction will not have an adverse impact on cultural, historical, or

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	<p>archaeological resources.” <u>Id.</u></p> <p>In this proposed finding of fact, the Flores-Case Ohana seemingly attempt to limit the consideration to the CDUA. Petitioners and Opposing Intervenors employed such “cherry-picking” previously during the CCH. The FEIS, however, <u>inter alia</u>, is to be considered in determining whether to approve the CDUA.</p> <p>These inaccuracies in Mr. Flores’ testimony, which the Flores-Case Ohana rely heavily on, combined with his clear bias, demonstrates Mr. Flores’ lack of credibility and his testimony, particularly his unsupported conclusions, should be given no weight.</p>
578	<p>Misleading. Presented out of context. Mischaracterization.</p> <p>The Flores-Case Ohana relies upon the direct testimony of Dr. Abad for this proposed finding of fact. Dr. Abad again is not credible for the reasons stated previously.</p> <p>On page 7, paragraph 8, of her direct testimony, Dr. Abad refers to a “TMT CDUA.” She is actually referring to the TMT Management Plan, which is Exhibit B to the CDUA. Page 2-2 of the TMT Management Plan states that “[t]here are no historic properties located within 200 feet of the limits of grading at the proposed TMT Observatory 13N site.” This is an accurate statement. Neither the Flores-Case Ohana nor Dr. Abad provided any evidence to dispute this statement. <u>See also</u> 2000 Master Plan, ex. A-44 at IX-200 (noting that a 200 feet setback is “10 times the setback distance required by the Hawai’i Island Burial Council for development near existing burials”).</p> <p>Moreover, these statements cannot be credibly read to mean, as the Flores-Case Ohana suggests, that the TMT Project’s review of potential impacts to historic properties was limited to 200 feet from the Project Site or 500 feet from the Batch Plan. Indeed, for example, just two pages later on page 2-4 of the TMT Management Plan, Figure 2-1 identifies the historic properties that are within the Astronomy Precinct, which goes beyond the 200 feet that the Flores-Case Ohana and Dr. Abad claim the CDUA limited its review to.</p>
579	<u>See</u> response to proposed finding of fact 578 above.
580	<u>See</u> response to proposed finding of fact 578 above.
581	<p><u>See</u> response to proposed finding of fact 578 above.</p> <p>Page 2-3 of the TMT Management Plan (Exhibit B. to R-1) clearly states: “There are no individual historic properties located within 500 feet of the Batch Plant. The Kukahau’ula TCP is located approximately 50 feet to the east of the Batch Plant area.”</p>
582	<u>See</u> response to proposed finding of fact 578 and 581 above. The Flores-Case Ohana cite to Dr. Abad’s direct testimony. Dr. Abad is again wrong as

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	Kukahau‘ula was not excluded in reviewing the potential impacts of the TMT Project. <u>See e.g.</u> , Ex. R-1 at 4-8 through 4-9.
583	Not a finding of fact.
584	Misrepresentation. Page 2-2 of the TMT Management Plan correctly states that Kukahau‘ula has been determined by SHPD to be a historic property. Ex. B to R-1 at 2-2. Dr. Abad, who the Flores-Case Ohana rely on for this proposed finding of fact, not only misrepresents the document, but also is incorrect in her attempt to misrepresent Kukahau‘ula as a historic “district.”
585	Misleading. Presented out of context. Dr. Abad is again referring to the TMT Management Plan attached to the CDUA as Ex. B. Moreover, to repeat, Dr. Abad is again wrong as Kukahau‘ula was included in the review of the TMT Project’s potential impacts. <u>See e.g.</u> , Ex. R-1 at 4-8 through 4-9. Her “cherry picking” of one page of the TMT Management Plan to support her incorrect and false statements demonstrates her lack of credibility. The fact that the Flores-Case Ohana repeats her “cherry-picked” statements that are not supported by the record also demonstrates their lack of credibility.
586	There was no information omitted. <u>See</u> response to proposed finding of fact 556 above.  This proposed finding of fact is based upon the testimony of Prof. Mills. Prof. Mills is not credible for the reasons already set forth in this response.
587	<u>See</u> responses to proposed findings of fact 556 and 586. No find spots were omitted as conceded by Prof. Mills on cross-examination.
588	Prof. Mills is not credible. <u>See</u> UH-TIO FOF ¶512 instead.
589	Prof. Mills is not credible. <u>See</u> UH-TIO FOF ¶512 instead.
590	Prof. Mills is not credible. <u>See</u> UH-TIO FOF ¶512 instead.
591	Prof. Mills is not credible. <u>See</u> UH-TIO FOF ¶512 instead.  The actual testimony from Prof. Mills states: “I do feel that underneath cultural impact assessment absolutely that modern ritual practices on that mountain are still things that need to be considered underneath Chapter 343 in terms of cultural impact assessment.” Tr. 1/25/17 at 26:22-27:1. Like the rest of his testimony, Prof. Mills conflates HRS Chapter 343 regarding EISs, with HAR § 13-5-30(c). Prof. Mills’ testimony is not credible and should be given no weight.
592	Not credible. Dr. Abad’s testimony is not credible for all the reasons already stated. Moreover, significant and appropriate consultation regarding the TMT Project has been conducted and continues to be conducted through this contested case. <u>See e.g.</u> , UH-TIO FOF ¶¶210-237; Ex. R-5, Appx. D (Cultural Impact Assessment Report).

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593	<u>See</u> response to proposed finding of fact 592 above.
594	<u>See</u> response to proposed finding of fact 592 above.  Bulletin 38 is not applicable because the TMT Project is not a federal project. Moreover, Bulletin 38 specifically provides that “the fact that [a property] is significant does not mean that it cannot be disturbed, or that the project must be foregone.” Ex. B.01j at 4.
595	<u>See</u> response to proposed finding of fact 592 above.
596	<u>See</u> response to proposed finding of fact 592 above.
597	<u>See</u> response to proposed finding of fact 592 above.  The Flores-Case Ohana compounds the lack of credibility by also misrepresenting Dr. Abad’s testimony. Dr. Abad did not state that “[o]ne of the largest flaws in archaeological and cultural impact documents prepared for the TMT Project . . . .” In the portion of her testimony cited, Dr. Abad did not even mention any of the reports related to the TMT Project. <u>See</u> Tr. 1/19/17 at 28:10-13.
598	<u>See</u> response to proposed finding of fact 592 above.
599	<u>See</u> response to proposed finding of fact 592 above.
600	<u>See</u> response to proposed finding of fact 592 above.  The NASA Report is irrelevant and immaterial.
601	<u>See</u> response to proposed finding of fact 592 above.
[601a]	Not credible. Prof. Mills’ testimony is not credible for all the reasons already stated. Moreover, significant and appropriate consultation regarding the TMT Project has been and continues to be conducted. <u>See e.g.</u> , UH-TIO FOF ¶¶210-237; Ex. R-5, Appx. D (Cultural Impact Assessment Report).
[601b]	<u>See</u> response to proposed finding of fact [601a] above.
602	<u>See</u> response to proposed finding of fact [601a] above.
603	<u>See</u> response to proposed finding of fact [601a] above.  This CCH is about the approval of a CDUA under the eight criteria set forth in HAR § 13-5-30(c), not an EIS under HRS Chapter 343. The time to comment on and challenge the EIS has passed. In fact, Prof. Mills commented on the DEIS for the TMT Project and described the DEIS as “ha[ving] been professionally prepared.” Ex. R-4 at 343 of 531. Prof. Mills conflates the requirements of HRS Chapter 343 with HAR § 13-5-30(c).
604	<u>See</u> response to proposed finding of fact 603 above.
605	<u>See</u> response to proposed finding of fact 603 above.

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606	<p><u>See</u> response to proposed finding of fact 603 above.</p> <p>The viewplanes from Waimea were considered in the FEIS. <u>See e.g.</u>, FEIS, R-3 at S-15 (noting that the “TMT Observatory will be visible from 14% of the island area . . . including portions of Honoka‘a, Waimea, and Waikoloa”); <u>Id.</u> at 3-92 (Figures 3-10 and 3-11).</p>
607	<u>See</u> responses to proposed findings of fact 603 and 607 above.
608	<u>See</u> responses to proposed findings of fact 603 and 607 above.
609	<u>See</u> responses to proposed findings of fact [601a], 603 and 607 above.
610	<u>See</u> responses to proposed findings of fact [601a], 603 and 607 above.
611	<p><u>See</u> responses to proposed findings of fact [601a], 603 and 607 above.</p> <p>Misleading. Partial quotation. In his cited direct testimony, Prof. Mills selectively quotes from the CDUA. The full sentence states: “Further, while the introduced elements associated with existing observatories may have had an effect on the perceived quality of the observances conducted, or may have caused some practitioners to conduct their observances further away from the vicinity of the observatories, there is no evidence suggesting that the presence of existing observatories has prevented or impacted those practices.” Ex. R-1 at 4-7. The sentence prior also states the following: “The majority of the areas within the MKSR where observances and rituals are believed to occur would not be affected by the Project.” <u>Id.</u></p>
612	<u>See</u> response to proposed finding of fact 603 above.
613	<p><u>See</u> response to proposed finding of fact 603 above.</p> <p>Prof. Mills did not submit any evidence or authority to suggest that the “Area of Potential Effect” that he refers to in his testimony applies to the consideration of a CDUA. Prof. Mills also admitted that he did not read <u>Kilakila ‘O Haleakala</u>, which affirmed that BLNR may focus its analysis on the permitted land use within the context of a specific area within a Conservation District designated for similar uses – e.g., the Astronomy Precinct. Tr. 1/25/17 at 147:21-24. The map – Figure 4.1 of Page 4-2 of the CDUA – identifies the historic properties that are within or near the Astronomy Precinct.</p>
614	<u>See</u> response to proposed finding of fact 613 above.
615	<u>See</u> response to proposed finding of fact 606 above.
616	<p><u>See</u> response to proposed finding of fact 606 above.</p> <p>This proposed finding of fact is entirely speculative also.</p>
617	<u>See</u> response to proposed finding of fact 606 above. <u>See</u> UH-TIO FOF ¶¶775-795; WDT Hayes at 2-17 (a substantial viewplane analysis was conducted from culturally significant areas and around the island of Hawaii).

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618	Not credible. Prof. Mills' testimony is not credible for all the reasons already stated.
619	Not credible. Prof. Mills' testimony is not credible for all the reasons already stated.
620	The documentation of both CSH 1 and CSH 2 was disclosed and extensively discussed in Appendix A to the AIS for the TMT Project, Ex. R-5, Appx. G. Notably, the Flores-Case Ohana do not dispute the findings that CSH 1 and CSH 2 are not historic properties. They do not dispute that CSH 1 is most likely a modern structure and that CSH 2 is a natural geological feature that only appeared to have been man-made. Ex. R-5, Appx. G at 39.
621	<u>See</u> response to proposed finding of fact 620 above.
622	<p>Consistent with the Hawai'i Supreme Court's decision in <u>Kilakila 'O Haleakalā v. Bd. of Land and Natural Resources</u>, 138 Hawai'i 383, 382 P.3d 195 (2016), Figure 4.1 of the CDUA identifies the Historic Properties that are within the Astronomy Precinct. It also identifies those Historic Properties that are in the vicinity of the other TMT Project areas. Finally, it identifies the Historic Properties in the culturally significant area of Pu'u Poliahu and Pu'u Wekiu.</p> <p>Figure 5.1 to the Archaeological Inventory Survey for the Astronomy Precinct in the Mauna Kea Science Reserve was attached as Appendix I Vol. III of the FEIS. <u>See</u> Ex. R-5. The FEIS is part of the record in this case and was identified as an exhibit by UHH. Consequently, there was no attempt to mislead or eliminate Figure 5.1 from the record in this CCH. Instead, as noted above, Figure 4.1 of the CDUA represents or depicts the specific area to be considered by BLNR (as approved in <u>Kilakila 'O Haleakalā</u>) in deciding whether to grant the CDUA.</p> <p>Ex. B.30 was not received into evidence.</p>
623	<u>See</u> response to proposed finding of fact 622 above.
624	<u>See</u> response to proposed finding of fact 622 above.
625	<u>See</u> response to proposed finding of fact 622 above.
626	<u>See</u> response to proposed finding of fact 622 above.
627	<u>See</u> response to proposed finding of fact 622 above.
628	<p>The credible and substantial evidence in the record establishes that an extensive analysis of viewplanes was conducted in connection with the TMT Project. <u>See</u> UH-TIO FOF ¶¶775-795; WDT Hayes at 2-17.</p> <p>The Flores-Case Ohana cite to Prof. Mills' testimony in support of this proposed finding of fact. Prof. Mills' testimony was not credible as detailed in this response.</p>

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629	<u>See</u> response to proposed finding of fact 629 above.
630	Not credible. Dr. Abad's testimony is not credible as already set forth throughout this response.
631	The Flores-Case Ohana did not present any credible evidence to support their claim that the "ring of shrines" would be impacted by the TMT Project. Dr. Abad, who they rely on for this proposed finding of fact, could not even identify where the "ring of shrines" is located on Mauna kea. By their own proposed finding of fact claiming inadequate studies and information, the Flores-Case Ohana concede that their beliefs on the alleged relationships between shrines are therefore speculative.
632	UHH, as the applicant, can satisfy its burden under HAR § 13-5-30(c) through oral or documentary evidence. HRS § 91-10(1). UHH was not required to produce a witness to substantiate every document it moved into evidence in the CCH. Indeed, Petitioners and Opposing Intervenors moved into evidence numerous exhibits that were not substantiated by a witness. Moreover, the Flores-Case Ohana could have subpoenaed someone from Cultural Surveys Hawaii. They chose not to.
633	Not in dispute. This proposed finding of fact also contradicts the Flores-Case Ohana's claim that the CDUA failed to consider potential impacts throughout the Mauna Kea Science Reserve.
634	<u>See</u> response to proposed finding of fact 632 above.
635	Not in dispute.
636	Misleading. Presented out of context. Mr. Nees was not offered to testify as to the CDUA. Mr. Perry White was offered and did testify to the CDUA.
637	Upon questioning by the Hearing Officer, Mr. Nees affirmed under oath that everything stated in his direct testimony is true. Tr. 12/5/16 at 7:15-8:17.
638	Citation does not support proposition. There is no transcript from 4/3/17.  In <u>Kilakila</u> , the Hawai'i Supreme Court, <u>inter alia</u> , affirmed that the BLNR, in considering the approval of a CDUA, may focus its analysis on the permitted land use within the context of a specific area within a Conservation District designated for similar uses – e.g., the Astronomy Precinct. The Flores-Case Ohana do not address <u>Kilakila</u> in their proposed findings of fact and conclusions of law. Mr. Flores also admitted on cross-examination that he never read <u>Kilakila</u> .
639	Inaccurate/False as demonstrated in response to the following proposed findings of fact.  The credible and substantial evidence in the record establishes that an extensive analysis of viewplanes was conducted in connection with the TMT Project. <u>See</u> UH-TIO FOF ¶¶775-795; WDT Hayes at 2-17. Based on the extensive analysis

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	<p>performed, it was determined that “the TMT Observatory will be visible from roughly 14 percent of the island area.” Ex. R-3 at 3-86. “[F]rom nearly all this area existing observatories are [already] currently visible.” <u>Id.</u> “The new area where the TMT Observatory will be visible and where currently none of the existing observatory can be seen is approximately 1.2 percent of the area of the island. Using the 200 U.S. Census average household size of 2.75 people for the County of Hawaii, 72 people live in this new area.” <u>Id.</u> at 3-101.</p> <p>The TMT Observatory will also not be visible from the culturally significant areas of Pu‘u Lilinoe, Pu‘u Wekiu, and Lake Waiau. Ex. C-18.</p>
640	<p>Unsupported/Unsubstantiated. The credible and substantial evidence in the record establishes that an extensive analysis of viewplanes was conducted in connection with the TMT Project. <u>See</u> UH-TIO FOF ¶¶775-795; WDT Hayes at 2-17. Based on this extensive analysis, it was concluded that the TMT Project will not have a substantial adverse impact on the visual resources of Mauna Kea. <u>See</u> WDT Hayes at 21-23. Other than the biased and unsupported testimony of Mr. Flores, the Flores-Case Ohana did not provide any actual or independent evidence to contradict the extensive visual impact analysis performed for the TMT Project. The Flores-Case Ohana fails to provide any credible evidence to support their claims of inaccuracies in the extensive visual impact analysis performed for the TMT Project.</p>
641	<u>See</u> response to proposed finding of fact 640 above.
642	<u>See</u> response to proposed finding of fact 640 above.
643	<u>See</u> response to proposed finding of fact 640 above.
644	<u>See</u> response to proposed finding of fact 640 above.
645	<u>See</u> response to proposed finding of fact 640 above.
646	<u>See</u> response to proposed finding of fact 640 above.
647	<u>See</u> response to proposed finding of fact 640 above.
648	<u>See</u> response to proposed finding of fact 640 above.
649	<p><u>See</u> response to proposed finding of fact 640 above. The TMT Project will not be visible from Pu‘u Wekiu, which is the summit of Mauna Kea. <u>See</u> Ex. C-18; Tr. 10/26/16 at 161:25-162:7 (Hayes testifying that the TMT Observatory will not be visible from Pu‘u Wekiu). Pu‘u Wekiu is located 1.16 miles from the proposed TMT Observatory site. <u>See</u> Ex. C-18.</p>
650	<u>See</u> response to proposed finding of fact 640 above.
651	<u>See</u> response to proposed finding of fact 640 above.
652	<u>See</u> response to proposed finding of fact 640 above.
653	<u>See</u> response to proposed finding of fact 640 above.



**E. Protection of Customary and Traditional Native Hawaiian Practices. [FCO's Exceptions at 44-53]**

FCO's Exceptions to HO COL 108-109, 330-334 [FCO's Exceptions at 45]: The FCO's Exceptions to the identified HO COLs are Inaccurate/False, Not Credible, Misleading, and a Mischaracterization of the applicable law.

The Hearing Officer applied *Ka Pa'akai O Ka 'Aina v. Land Use Commission*, 94 Hawai'i 31, 7 P.3d 1068 (2000) and considered the constitutional protection of customary and traditional Native Hawaiian practices in reaching the HO FOF/COL. *See* HO COL 108-110; 329-359. The FCO, however, argues that the HO FOF/COL is incomplete because it does not include a COL with the following language: "agencies are obligated to make an assessment, independent of the developer or the applicant of impacts on customary and traditional practices of Native Hawaiians." FCO Exceptions at 45. The FCO appears to infer that this quoted language is from *Ka Pa'akai*. The FCO, however, does not provide a pin cite for this alleged quote and UH Hilo and TIO were unable to find this alleged quote in *Ka Pa'akai*. Rather, the Hawai'i Supreme Court stated in *Ka Pa'akai* that a state agency "may not act without independently considering the effect of their actions on Hawaiian traditions and practices." *Id.* at 46, 7 P.3d at 1083. UH Hilo and TIO submit that this principle is already captured in the HO COLs. *See e.g.*, HO COL 109 and 330.

The FCO also continues to argue that the BLNR was required to conduct a *Ka Pa'akai* analysis before the CCH. The FCO is simply incorrect. *Ka Pa'akai* does not require that a *Ka Pa'akai* analysis be performed by a state agency before a contested case hearing. Rather, a *Ka Pa'akai* analysis can be done within the context of a contested case hearing, as was done here. In *Ka Pa'akai*, the Hawai'i Supreme Court provided an analytical framework "to effectuate the State's obligation to protect native Hawaiian customary and traditional practices while

reasonably accommodating competing private interests[.]” *Id.* at 46-47, 7 P.3d at 1083-84. “In order to fulfill its duty to preserve and protect customary and traditional native Hawaiian rights to the extent feasible[.]” a state agency must, at a minimum, “***make specific findings and conclusions*** as to (1) the identity and scope of “valued cultural, historical, or natural resources in the [application] area, including the extent to which traditional and customary native Hawaiian rights are exercised in the [application] area; (2) the extent to which those resources – including traditional and customary native Hawaiian rights – will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken by the [agency] to reasonably protect native Hawaiian rights if they are found to exist.” *Id.* at 47, 7 P.3d at 1084 (footnotes omitted) (emphasis added).

Notably, as *Ka Pa ‘akai* itself clearly demonstrates, a *Ka Pa ‘akai* analysis can be conducted by an agency within the context of a contested case hearing. Indeed, in *Ka Pa ‘akai*, the Hawai‘i Supreme Court analyzed the Land Use Commission’s (“LUC”) findings of fact and conclusions of law following a contested case hearing. In its opinion, the Hawai‘i Supreme Court did not hold that a *Ka Pa ‘akai* analysis should have been held before the contested case hearing. It also did not remand the matter back to the LUC to conduct a *Ka Pa ‘akai* analysis before a contested case hearing. Instead, the Hawai‘i Supreme Court remanded the matter back to the LUC “***for the limited purpose of entering specific findings and conclusions, with further hearing if necessary***, [on the three factors noted above].” *Id.* at 53, 7 P.3d at 1090 (emphasis added).

Consequently, the BLNR was not required to conduct a *Ka Pa ‘akai* analysis before the CCH. The FCO’s argument to the contrary is incorrect and the Hearing Officer properly rejected FCO COL 179-191.

FCO's Exceptions to HO COL 341, 353, 358, 388 [FCO's Exceptions at 49]: The FCO's Exceptions to the identified HO COLs are Inaccurate/False, Not Credible, Misleading, and a Mischaracterization of the applicable law. The FCO takes specific exception to the identified HO COLs by merely incorporating the FCO COLs that they previously identified – *i.e.*, FCO COL 179-191. Per the above, the Hearing Officer properly rejected FCO COL 179-191. The FCO's argument that the BLNR had to conduct a *Ka Pa 'akai* analysis prior to the CCH is meritless. The Hearing Officer conducted a proper *Ka Pa 'akai* analysis and appropriately considered the constitutional protection afforded to customary and traditional Native Hawaiian practices. *See* HO COL 108-110; 329-359.

FCO's Exceptions to HO COL 110, 344 [FCO Exceptions at 49]: The FCO's Exceptions to the identified HO COLs are Inaccurate/False, Not Credible, Misleading, and a Mischaracterization of the applicable law. The FCO takes specific exception to the identified HO COLs claiming that they are “fabricated conclusions due to DLNR's and BLNR's failure to complete an independent analysis as previously noted.” FCO Exceptions at 49. UH Hilo and TIO hereby incorporate by this reference their above responses to the FCO's incorrect arguments concerning *Ka Pa 'akai*.

FCO's Exceptions regarding alleged failure to complete CMP management actions [FCO Exceptions at 49]: The FCO's Exceptions are Inaccurate/False, Not Credible, Misleading, and Unsupported/Unsubstantiated. The FCO argues that UH Hilo is incapable of fulfilling their constitutional obligations to protect Native Hawaiian customary and traditional practices associated with Mauna Kea because it has failed to “implement significant CMP management actions to protect the natural and cultural resources.” FCO Exceptions at 49. Preliminarily, the CMP discusses timelines to initiate (not complete) management actions. *See infra*. Next, the

FCO does not identify the CMP management actions concerning natural and cultural resources that it believes UH Hilo has failed to initiate. *See id.* In the FCO Proposed FOF/COL, the FCO did identify certain CMP management actions that it believed had not been initiated. *See* FCO FOF 456-458. The FCO identified the following management actions: CR-2; CR-4; NR-3; NR-4; NR-12; EO-4; IM-14; FLU-2; OI-4; and MEU-2. UH-Hilo and TIO responded to each management action in the UHH-TIO Joint Response to FCO Proposed FOF/COL. *See* UHH-TIO Joint Response to FCO Proposed FOF/COL at B-102-B-110. For ease of reference, UH Hilo and TIO repeat their responses here:

OMKM is in compliance with the CMP management actions. The following addresses the specific management actions identified by the Flores-Case Ohana in his proposed findings of fact. See generally Ex. A-22.

#### CR-2

CR-2 states that OMKM is to support the application for designation of the summit region of Mauna Kea as a TCP. The initiation (not completion as incorrectly argued by the Flores-Case Ohana) of said management action was identified as “Short-term” – i.e., 4-6 years. SHPD has not yet prepared the application. See Ex. A-22 at 14 of 37. Consequently, OMKM’s support of the application remains an ongoing management action and will continue to be an ongoing management action until SHPD submits the application. The AIS (B.02y-1 and B.02y-2) and the Burial Treatment Plan (A-138) are evidence of OMKM’s proactive efforts to further its knowledge in support of any potential application should SHPD chose to proceed. OMKM is in compliance with CR-2.

#### CR-4

CR-4 states that OMKM is to establish a process for ongoing collection of information on traditional, contemporary and customary cultural practices. The initiation of this management action was identified as “Short-term” – i.e., 4-6 years. See Ex. A-16 at B-3. In 2016, regarding this management action, OMKM reported that its “staff met with [SHPD] staff in 2015 to discuss practices at various sites. Discussions with Kahu Ku Mauna Council to craft a culturally appropriate process continue.” Ex. A-

22 at 15 of 37. As part of its general duties, Kahu Ku Mauna also reviews and advises on cultural, spiritual, and historic values. See Ex. A-144 at 6. Consequently, the management action, though not complete, has been initiated within the short-term goal set forth in the CMP. OMKM is in compliance with CR-4.

### NR-3

NR-3 states that OMKM is to maintain native plant and animal populations. The initiation of this management action was identified as “Mid and Long-term” – i.e., 7-10+ years. See Ex. A-16 at B-4. In 2016, regarding this management action, OMKM reported that “[n]on-native plants and arthropods are monitored. The Division of Forestry and Wildlife is completing a circum-Maunakea fence and ungulate removal from Palila critical habitat. OMKM staff investigated mamane leaf curl frequency at Hale Pokahu (plant disease response) in coordination with UHH scientists.” Ex. A-22 at 17 of 37; see also Ex. A-22 at 18 of 37 (comments to NR-9 demonstrate considerable work being done to maintain native plant populations); id. at 19 of 37 (comments to NR-15, NR-16, and NR-18 demonstrated additional work being done to maintain native plant and animal populations). OMKM has also been doing extensive work on maintaining the wekiu bug. See Ex. A-17 at 4 of 7; see also infra discussion regarding NR-12.

Consequently, there are ongoing efforts to maintain native plant and animal populations. By its plain language, this is a management action that is ongoing. OMKM will continue to strive to maintain native plant and animal populations in its ongoing management of Mauna Kea. OMKM is in compliance with NR-3.

### NR-4

NR-4 states that OMKM is to minimize barriers to species migration to help maintain populations and protect ecosystem processes and development. The initiation of this management action was identified as “Mid and Long-term” – i.e., 7-10+ years. See Ex. A-16 at B-4. In 2016, regarding this management action, OMKM reported that it “coordinates with Forest Reserve, Natural Area Reserve, and [DLNR] technical staff to identify issues, craft appropriate responses, and investigate concerns regarding ecosystems and flora and fauna populations.” Ex. A-22 at 17 of 37. Consequently, there are ongoing efforts to address this management action. By its plain language, this is a management action that is ongoing. OMKM will continue to strive to minimize barriers to species migration to help maintain populations and protect ecosystem processes and development in its ongoing management of Mauna Kea. OMKM is in compliance with NR-4.

#### NR-12

NR-12 states that OMKM is to create restoration plans and conduct habitat restoration activities, as needed. The initiation of said management action was identified as “As needed.” See Ex. A-16 at B-5. In 2016, regarding this management action, OMK reported that “[a] study of wekiu bug habitat restoration was initiated in 2015, and a study and mapping of wekiu bug habitat has been completed.” Ex. A-22 at 18 of 37. Kamehameha High School student Isreal Stillman conducted his senior legacy project in the Science & Natural Resources academy; repeating the vegetation inventory in Halepōhaku and building plant propagation benches and planting several hundred native plant seedlings. Ex. A-21 at 8 of 27. OMKM will continue to create restoration plans and conduct habitat restoration activities “as needed” in compliance with NR-12. OMKM is in compliance with NR-12.

#### EO-4

EO-4 states that OMKM is to develop and implement a signage plan to improve signage throughout the UH Management Areas (interpretive, safety, rules, and regulations). The initiation of said management action was initially identified as “Immediate” – i.e., 1-3 years. Ex. A-16 at B-6. It was later “deferred to Short Term to accommodate the accrual of additional resource information.” Ex. A-17 at 5 of 15. In 2013, regarding this management action, OMKM reported that “[a] map showing the location of signs on UH’s managed lands [was] completed. New cultural and safety related signs are planned.” Ex. A-18 at 7 of 15. In 2016, OMKM reported that “[c]ultural and safety related signs have been installed” and “[a] draft sign plan in [sic] under review.” Ex. A-22 at 20 of 37. Consequently, certain components of this management action have been completed and others are ongoing. OMKM is in compliance with EO-4.

#### IM-14

IM-14 states that OMKM is to encourage observatories to investigate options to reduce the use of hazardous materials in telescope operation. The initiation of said management action was identified as “Short-term” – i.e., 4-6 years. Ex. A-16 at B-10. In 2016, regarding this management action, OMKM identified said management action as ongoing and reported that “[w]ith the development of new technology, observatories are beginning to reduce their need to use hazardous material. An example, is the TMT observatory, which will not be using mercury.” Ex. A-22 at 25 of 37. The latter statement was confirmed during this CCH. See UH-TIO FOF ¶824 (confirming that no mercury will be used

at the TMT Observatory, and no hazardous waste is anticipated to be generated at the TMT Observatory). By its plain language, this is a management action that is ongoing. OMKM will continue to encourage observatories to investigate options to reduce the use of hazardous materials in telescope operation. OMKM is in compliance with IM-14

#### FLU-2

FLU-2 states that OMKM is to develop a map with land-use zones in the Astronomy Precinct based on updated inventories of cultural and natural resources, to delineate where future land use will not be allowed and areas where future land use will be allowed but will require compliance with prerequisite studies or analysis prior to approval of Conservation District Use Permit. The initiation of said management action was initially identified as “Immediate” – i.e., 1-3 years, but was later revised to “Short term” – i.e., 4-6 years – because “this task will require additional data gathered from baseline surveys of the resources.” Ex. A-17 at 12 of 15. Those surveys are currently ongoing. Tr. 12/6/16 at 165:11-23. Moreover, in terms of astronomy development, Governor Ige has stated that the TMT Project site should be the last new site developed on Mauna Kea and that any future development occur on already existing sites. The University confirmed that the TMT Project is the last new area on Mauna Kea where a telescope will be build. UH-TIO FOF ¶154. Consequently, although it is not completed, OMKM has initiated FLU-2. OMKM is in compliance with FLU-2.

#### OI-4

OI-4 states that OMKM is to establish grievance procedures for OMKM, to address issues as they arise. The initiation of said management action was identified as “Short-term” – i.e., 4-6 years. In 2016, regarding this management action, OMKM reported that it “is currently designing a grievance process.” Ex. A-22 at 28 of 37. Kahu Ku Mauna may assist in dispute resolution. Ex. A-144 at 6. Consequently, although it is not completed, OMKM has initiated OI-4. OMKM is in compliance with OI-4.

#### MEU-2

MEU-2 states that OMKM is to conduct regular updates for the CMP that reflect outcomes of the evaluation process, and that incorporate new information about the resources. The initiation of said management action was identified as “Short-term” – i.e., 4-6 years - and “As needed.” Ex. A-16 at B-12. Starting in 2010, and for every year since then, OMKM has provided annual progress

reports to BLNR regarding the implementation of the CMP's management actions. See Exs. A-16 through A-22. In 2016, OMKM reported in its annual progress report that "[m]ost management actions have either been implemented or are in progress. Many actions are considered 'ongoing' as they are long term, continuous land management responsibilities." Ex. A-22 at 2 of 37; see UH-TIO FOF ¶¶189-190. OMKM is in compliance with MEU-2.

Id.

FCO's Exceptions to HO FOF 457, 572-573, 678, 696, 713, 728, 778, 782; COL 203, 340, 343, 346, 388 [FCO's Exceptions at 49-50]: The FCO's Exceptions to the identified HO FOFs and COLs are Inaccurate/False, Not Credible, and Unsupported/Unsubstantiated. The FCO takes exception to the characterization of certain practices and find spots as being contemporary. Notably, however, the FCO does not cite to any evidence that the characterization of the practices and find spots as contemporary is incorrect. The FCO takes exception, for example, to HO FOF 696, which provides:

No known traditional and customary practices are associated with the proposed 5-acre TMT Project site. Since 2015, contemporary Hawaiian practices have taken place on the site, including the construction of two ahu.

Significantly, the FCO does not cite to any evidence to dispute the fact that "[n]o known traditional and customary practices are associated with the proposed 5-acre TMT Project site." It is also clear that the two ahu on the TMT Project site were constructed after the site had already been selected for the TMT Observatory and in protest of the TMT Project. The erection of an ahu after the site had already been selected is not a customary and traditional practice, or the reasonable exercise thereof, and cannot serve as the basis to reject the TMT Project.

FCO's Exceptions to HO FOF 571-573, 575, 587, 610, 612, 614, 616, 657; COL 389 [FCO's Exceptions at 50]: The FCO's Exceptions to the identified HO FOFs and COLs are



Inaccurate/False, Not Credible, and Unsupported/Unsubstantiated. The FCO incorrectly argues that the Hearing Officer referred to all “find spots” as modern features. FCO Exceptions at 50. None of the HO FOFs or COLs identified by the FCO state that all “find spots” are modern. Instead, HO FOF 572 provides, in relevant part, that “‘Find spots’ are cultural resources that are obviously modern features or features that cannot be classified with any confidence because of their uncertain age or function.” *Id.* Ironically, the foregoing is almost identical to FCO FOF 312, a proposed finding of fact that the FCO claims the Hearing Officer failed to consider.

The determination of what sites were historic versus modern “find spots” was made using the criteria established by Dr. McCoy in 1995, based on reasonable scientific certainty. *See* HO FOF 610 (citing Tr. 12/05/16 at 252:21-253:3). In 2005, seven “find spots” were identified in the Astronomy Precinct. *See* Ex. A-55 at 5-20. Two “find spots” were also identified in area E. Both “find spots” were evaluated and determined to be modern features. *See* HO FOF 614 and 616. The FCO does not provide any evidence to dispute the above facts. The FCO does not provide any evidence establishing that these “find spots” or any other “find spots” in the greater MKSR are not modern features. The FCO also does not provide any evidence establishing that any of these “find spots” will be substantially impacted by the TMT Project. Simply stated, the FCO’s claim that it is “highly likely that some of these find spots are actually historic properties” is completely speculative and unfounded. *See* FCO FOF 321.

FCO’s Exceptions to HO COL 351 [FCO’s Exceptions at 51-52]: The FCO’s Exceptions to the identified HO COL are Inaccurate/False, Not Credible, and Unsupported/Unsubstantiated. The Hearing Officer concluded in HO COL 351 that the “Petitioners and Opposing Intervenors have not met their burden to show that any of their practices – whether contemporary, or traditional and customary – occurred at the location of the TMT Project site prior to the proposal

of the TMT Project and the designation of the site.” *Id.* The FCO argues that this conclusion is inaccurate and false because “substantial material evidence has been presented during this CCH to substantiate that Native Hawaiian traditional and customary practices occurred on the northern plateau and in the vicinity and location of the proposed TMT site.” FCO Exceptions at 52. The FCO, however, fails to cite to any of this “substantial material evidence.” *Id.*

The FCO argues that the MKSR AIS “identified hundreds of shrines and other cultural sites on the northern plateau that are associated with Native Hawaiian practices predating 1892.” FCO Exceptions at 52. The FCO again fails to cite any evidence to support this statement. The FCO specifically identified SIHP Site Nos. 16169 and 21447 in its FCO’s Exceptions. However, neither SIHP site is located in the 5-acre TMT Project site. *See* Ex. R-1 at 4-2 (Figure 4.1). The FCO also specifically identified five “find spots” in its FCO’s Exceptions. Three of the five are not located in the 5-acre TMT Project site. *See* Ex. B.02m (Figure 5.1). Two look to be within area E. However, as noted above, both “find spots” were evaluated and determined to be modern features. The FCO does not provide any evidence disputing this evaluation and determination. The FCO also fails to establish that either “find spot” will be substantially impacted by the TMT Project.

FCO’s Exceptions to HO FOF 832 [FCO’s Exceptions at 52]: The FCO’s Exceptions to the identified HO FOF is Inaccurate/False, Not Credible, and Unsupported/Unsubstantiated. The FCO cherry-picks HO FOF 832 and argues that in isolation it does not have a citation and is unsubstantiated. The FCO conveniently neglects to mention that HO FOF 831, the immediately preceding finding of fact, identifies with supporting evidence examples of the cultural and/or spiritual practices that involve Mauna Kea that have been and continue to be conducted from the year 2000 to the present. *See* HO FOF 831. The Hearing Officer also found based on the

evidence that such cultural and/or spiritual practices would not be prevented by the building of the TMT Project. The FCO does not provide any evidence to the contrary.

FCO's Exceptions to HO FOF 833; COL 203-205, 208-210, 213, 343-347, 349-353, 357-359 [FCO's Exceptions at 52]: The FCO's Exceptions to the identified HOF FOFs and HO COLs are Inaccurate/False, Not Credible, and Unsupported/Unsubstantiated. The Hearing Officer found that "the reliable, substantial and credible evidence demonstrates that the TMT Project will not result in any substantial adverse impact on the cultural practices of the community or State or native Hawaiian traditional and customary practices on Mauna Kea." HO FOF 833. The FCO argue that HO FOF 833 and the related HO COLs are inaccurate and/or misleading because the Hearing Officer failed to consider the testimony of Pualani Case ("**Ms. Case**") and "several [unidentified] Native Hawaiian cultural practitioners. FCO Exceptions at 52. This claim is entirely specious. The Hearing Officer clearly considered the testimony of Ms. Case and Native Hawaiian cultural practitioners. Indeed, and as an example, the Hearing Officer quoted extensively from Ms. Case's testimony in the HO FOF/COL. *See* HO FOF 400-423.

Ms. Case testified that she conducts her cultural practices in the Northern Plateau. Ex. B.21a at 4. The Northern Plateau is approximately 2,000 acres. The proposed TMT Observatory site will take up just five of those 2,000 acres. *See* HO FOF 842. Ms. Case did not testify that she conducted any of her cultural practices within the proposed TMT Observatory site. Nor did she explain why she could not conduct her cultural practices on the remaining 1,995 acres on the Northern Plateau.

Ms. Case testified that she did not start conducting her cultural practices on "the top of Mauna Kea[.]" and presumably the Northern Plateau, until 2010. Tr. 1/11/17 at 228:1-19. Consequently, the entire time that Ms. Case has been conducting her cultural practices on Mauna

Kea there have been observatories present. She has been able to conduct her cultural practices amongst the observatories.

Based on undisputed evidence like the above, the Hearing Officer found that “[t]he reliable, substantial and credible evidence demonstrates that the TMT Project will not result in any substantial adverse impact on the cultural practices of the community or State or native Hawaiian traditional and customary practices on Mauna Kea.” HO FOF 833. The FCO may disagree with the Hearing Officer’s ultimate finding, but it is entirely specious to argue that the Hearing Officer did not fully consider or evaluate the testimony of Ms. Case and other Native Hawaiian cultural practitioners. The Hearing Officer did and the reliable, probative, and substantial evidence in the record supports her findings and conclusions.

FCO’s Exception to HO FOF 725 [FCO’s Exceptions at 53]: Ku’ulei Kanahele (“**Ms. Kanahele**”) was called as a witness by KAHEA to testify as to the hydrology of Mauna Kea through the interpretation of Native Hawaiian chants. Ms. Kanahele testified that based on her interpretation of chants the only waters that should be in Lake Waiau are those that naturally occur in the Wao Akua region. *See* 1/24/17 at 194:11-24. Moreover, Ms. Kanahele testified that “in my readings of the chant, ***water was not taken up to the mountain.***” *Id.* at 196:4-6 (emphasis added). Contrary to the FCO’s arguments, Ms. Kanehele did not state that the prohibition against outside water being taken up Mauna Kea only applies “in certain cases.” FCO Exceptions at 53. Ms. Kanahele did not qualify or provide any exceptions to her testimony. The FCO apparently believes that it is acceptable to bring outside water up to Mauna Kea in certain cases. UH Hilo and TIO do not dispute the FCO’s beliefs in that regard. However, the clear conflict between Ms. Kanahele’s testimony and the FCO’s beliefs clearly demonstrates, as

the Hearing Officer found, “that there is substantial flexibility when it comes to interpreting Native Hawaiian culture and traditions.” HO FOF 725.

FCO’s Exceptions to HO FOF 567-569 [FCO’s Exceptions at 53]: The TMT Project was not required to complete a Section 106 consultation process under NEPA and NHPA. *See* HO COL 434-451.

**F. There is No Requirement to Complete an EIS for a New Master Lease Before the CDUA can be Granted. [FCO’s Exceptions at 54-55]**

The FCO fails to cite to any legal authority requiring UH Hilo to complete an EIS for a new master lease before the CDUA can be granted. The Hearing Officer properly rejected FCO COL 167-175.

**G. The Hearing Officer did not Mischaracterize, Mislead, or Make False Comments Regarding Witnesses. [FCO’s Exceptions at 55-65]**

FCO’s Exceptions to HO FOF 245 [FCO’s Exceptions at 55-56]: The FCO’s Exceptions to HO FOF 245 are Inaccurate/False, Not Credible, and Unsupported/Unsubstantiated. It is undisputed that Ms. Case stated the following in her February 1, 2015 Facebook post: “The Mauna Kea Hui is reaching out to you because we believe it is most prudent for us to BOYCOTT the so-called EISPN ‘open house[,]’ which means we will not participate in these so called ‘open houses’ or take any part in this FAKE EIS process until the courts have decided our Mauna Kea Case(s).” Ex. A-129 at 1 (capital letters in original). Consequently, there is no confusion. Ms. Case and the Mauna Kea Hui clearly called for and actively boycotted the UH-Hilo’s consultation efforts regarding Mauna Kea. The FCO speciously argues that these open houses were not consultation efforts. The purpose of open houses is to hear from the public. That is clearly a form of consultation. Finally, the FCO speciously argues that this boycott had nothing to do with the TMT Project. *See* FCO Exceptions at 56. That specious argument is

belied by the numerous references to the TMT Project in Ms. Case's Facebook post. See Ex. A-129.

FCO's Exceptions to HO FOF 243 [FCO's Exceptions at 56]: The FCO's Exceptions to HO FOF 243 are Inaccurate/False, Not Credible, and Unsupported/Unsubstantiated. Dr. Manulani Meyer ("**Dr. Meyer**") was asked whether she had read the CDUA for the TMT Project. She responded: "I try not to read these documents, truly." Tr. 1/26/17 at 35:3-5. Consequently, HO FOF 243 is supported by the reliable, probative, and substantial evidence in the whole record. It should also be noted that the FCO do not cite to any evidence establishing that Dr. Meyer read any of the documents and studies related to the TMT Project.

FCO's Exceptions to HO FOF 343 [FCO's Exceptions at 56]: The FCO's Exceptions to HO FOF 343 are Inaccurate/False, Not Credible, and Unsupported/Unsubstantiated. Dr. Ku Kahakalau ("**Dr. Kahakalau**") was asked whether the building of the TMT Project is something that cannot be comprised. She responded: "I think it's a non-negotiable, yes, cannot be comprised." Tr. 1/9/17 at 116:22-117:1. Dr. Kahakalau then testified as follows:

Q: So no matter what evidence is presented to you, no matter what arguments are made to you, no matter what offers of compromise are made to you, you would shut the door on that?

A: Yes.

*Id.* at 117:2-4.

Consequently, the reliable, probative, and substantial evidence in the whole record clearly supports HO FOF 343. The FCO nevertheless seems to argue that the real reason for her testimony was not considered by the Hearing Officer. The FCO is again incorrect. The Hearing Officer clearly considered the testimony of Dr. Kahakalau and even incorporated her entire written direct testimony in the findings of fact. *See* HO FOF 342.

FCO's Exceptions to HO FOF 753; COL 386 [FCO's Exceptions at 57]: The FCO's Exceptions to the identified HO FOF and HO COL are Inaccurate/False, Not Credible, and Unsupported/Unsubstantiated. HO FOF 753 and HO COL 386 are supported by specific citations to the testimony of Dr. Kahakalau. The FCO does not dispute that those citations support HO FOF 753 and COL 386. Consequently, HO FOF 753 and COL 386 are supported by the reliable, probative, and substantial evidence in the whole record.

FCO's Exceptions to HO FOF 627 [FCO's Exceptions at 57]: The FCO's Exceptions to HO FOF 627 are Inaccurate/False, Not Credible, and Unsupported/Unsubstantiated. HO FOF 627 is supported by specific citations to the testimony of Diana LaRose. The FCO does not dispute that those citations support HO FOF 627. Consequently, HO FOF 627 is supported by the reliable, probative, and substantial evidence in the record.

FCO's Exceptions to HO FOF 692 [FCO's Exceptions at 57]: The FCO's Exceptions to HO FOF 692 are Inaccurate/False, Not Credible, and Unsupported/Unsubstantiated. HO FOF 692 is supported by specific citations to the testimony of Mr. Flores. Mr. Flores testified that whether religious practices and spiritual and cultural practices are one and the same "depends on the practice." Tr. 1/30/17 at 234:16-19. Consequently, a reasonable inference from Mr. Flores' testimony is "that not all religious practices are spiritual and cultural." HO FOF 692. HO FOF 692 is supported by the reliable, probative, and substantial evidence in the record.

FCO's Exceptions to HO FOF 226, 813 [FCO's Exceptions at 57-58]: The FCO's Exceptions to the identified HO FOFs are Inaccurate/False, Not Credible, and Unsupported/Unsubstantiated. It is undisputed that Cultural Surveys Hawaii, Inc. reached out to Mr. Flores to comment on the TMT Project. Ex. A-131. Mr. Flores could not recall submitting a statement in response to CSH. *See* Tr. 1/30/17 at 215:4-12. There was also no evidence

presented during the CCH establishing that Mr. Flores submitted a statement in response to CSH. Consequently, the finding “Though Flores was sent information about consultation, he did not respond or otherwise participate in the process” is accurate and supported by the reliable, probative, and substantial evidence in the whole record. Despite having no recollection of even the email during the CCH, Mr. Flores apparently now argues that he did not respond because CSH did not send him the project scope. Regardless of his reason, however, Mr. Flores did not respond and did not participate in the consultation process. HO FOF 226 and 813 are therefore supported by the reliable, probative, and substantial evidence in the whole record.

FCO’s Exceptions to HO FOF 813 [FCO’s Exceptions at 58]: The FCO’s Exceptions to HO FOF 813 are Inaccurate/False, Not Credible, and Unsupported/Unsubstantiated. HO FOF 813 is supported by specific citations to the testimony of Mr. Flores. The FCO does not dispute that those citations support HO FOF 813. For example, as accurately stated in HO FOF 813, Mr. Flores testified that he had never prepared a CDUA, EIS, or AIS. *See* Tr. 1/30/17 at 212:19-213:7. The reliable, probative, and substantial evidence in the whole record therefore supports HO FOF 813. The FCO nevertheless seems to argue that the Hearing Officer did not consider Mr. Flores’ experience and qualifications. The FCO is again incorrect. The Hearing Officer specifically considered Mr. Flores’ experience and qualifications in HO FOF 811.

FCO’s Exceptions to HO FOF 815 [FCO’s Exceptions at 58]: The FCO’s Exceptions to HO FOF 815 are Inaccurate/False, Not Credible, and Unsupported/Unsubstantiated. The FCO apparently takes exception to the Hearing Officer’s finding that Mr. Flores did not provide evidence that he takes part in rituals and celebrations during solstices and equinoxes. The FCO then cites to Ex. B.02a at 24-25 as alleged support or evidence that Mr. Flores does take part in these activities. Pages 24 and 25 of Ex. B.02a do not state that Mr. Flores takes part in these



activities. Consequently, the FCO has failed to produce any evidence from the record contradicting HO FOF 815.

FCO's Exceptions to HO FOF 816 [FCO's Exceptions at 58-59]: The FCO's Exceptions to HO FOF 816 are Inaccurate/False, Not Credible, and Unsupported/Unsubstantiated. HO FOF 816 finds that "[t]here are no historic properties or ahu on the proposed 5-acre TMT Project site." *Id.* The FCO despite characterizing the following as an absurd finding fails to provide any evidence to dispute this fact. Neither Mr. Flores nor anyone else testified that there are historic properties or ahu on the proposed 5-acre TMT Project site. No one produced a photograph of a historic property or ahu that is on the proposed 5-acre TMT Project site. Simply stated, the reliable, probative, and substantial evidence in the whole record supports the finding that there are no historic properties or ahu on the proposed 5-acre TMT Project site.

Though the FCO claimed that the TMT Project would cause substantial adverse impact to the "ring of shrines[,]" it never provided any credible evidence of such substantial adverse impact. In fact, one of their witnesses, Dr. Abad could not even identify where the "ring of shrines" was located. UH Hilo and TIO also incorporate by this reference their responses to FCO FOF 271-273 and 735-769.

The FCO next lists certain proposed FCO FOFs from the FCO Proposed FOF/COL that it believes the Hearing Officer should have included in the HO FOF/COL. UH-Hilo and TIO have already responded to the FCO FOFs in the UHH-TIO Joint Response to FCO Proposed FOF/COL. For the convenience of the BLNR, UH-Hilo and TIO repeat those responses in the below table:

180	<u>See</u> response to proposed finding of fact 178 above regarding beliefs. This proposed finding of fact and citation is not evidence that customary and traditional practices occur within the area E location site of the TMT Observatory.
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271	<p>Inaccurate/False. Not credible. The TMT Project is proposed to be built in the Astronomy Precinct, which Mr. Flores himself conceded during cross-examination was “substantially developed.” Tr. 1/30/17 at 234:5-8; <u>see also</u> WDT Flores at 4 (recognizing that the “public lands” for the proposed TMT Project are “fully developed”). Ironically, Mr. Flores uses the roads from this development to drive his truck up to the Mauna Kea summit. Tr. 1/30/17 at 233:25-234:4.</p> <p>Credible and substantial evidence was also presented from others, including other Petitioners and Opposing Intervenor, during the CCH demonstrating that the Astronomy Precinct is substantially or fully developed. <u>See e.g.</u>, UH-TIO FOF ¶¶851, 859-864.</p> <p>Substantial and credible evidence was also presented establishing that the Northern Plateau was chosen in large part to avoid the most culturally sensitive areas of the summit ridge. <u>See e.g.</u>, UH-TIO FOF ¶¶308, 342.c.</p> <p>Flores’ testimony is also contradicted by the credible and substantial evidence presented that it was found, after extensive consultation, that there are no known ahu (other than those that were erected after or in protest of the TMT Project) or historical features near the TMT Project area. <u>See</u> UH-TIO FOF ¶¶342.c; 629.</p> <p>Flores fails to present any actual or independent evidence supporting his claim that ahu or shrines (other than those that were erected after or in protest of the TMT Project) will be impacted by the TMT Project. Flores merely relies on his own biased and unsubstantiated testimony. This is not sufficient to rebut the credible and substantial evidence submitted by UH in this CCH.</p>
272	<p><u>See</u> response to proposed finding of fact 271 above. There is no reliable probative and substantial evidence that the referenced practices are actually within the bundle of rights protected by article XII, section 7 of the Hawaii State Constitution.</p> <p><u>See</u> response to proposed finding of fact 178 above regarding beliefs.</p>
273	<p><u>See</u> response to proposed finding of fact 271 above. Not in dispute as to beliefs by certain individuals. The alleged observations are not scientifically or logically verifiable and not demonstrated by admissible evidence; or otherwise the weight given to such testimony and exhibits is of little significance due to its lack of reliable probative value and/or materiality in connection with the criteria or legal issues to be resolved in this case.</p> <p><u>See</u> response to proposed finding of fact 178 above regarding beliefs.</p>
274	<p><u>See</u> response to proposed finding of fact 178 above regarding beliefs.</p>
275	<p>Not in dispute generally, but the document or authority cited speaks for itself. Certain alleged observations outside the existence of the obvious rock placement <i>in situ</i> are not scientifically or logically verifiable and not</p>

	demonstrated by admissible evidence; or otherwise the weight given to such testimony and exhibits is of little significance due to its lack of reliable probative value and/or materiality in connection with the criteria or legal issues to be resolved in this case.
276	<u>See</u> response to proposed finding of fact 275 above.
277	<u>See</u> response to proposed finding of fact 275 above.
278	<u>See</u> response to proposed finding of fact 275 above.
279	<u>See</u> response to proposed finding of fact 275 above.
280	<u>See</u> response to proposed finding of fact 275 above. <u>See</u> response to proposed finding of fact 178 above regarding beliefs.
287	<u>See</u> response to proposed finding of fact 285 above. The Mauna Kea Adze Quarry Complex is 2.25 miles from the proposed TMT Project site. Ex. C-18.
542	<u>See</u> response to proposed finding of fact 541 above.
572	<u>See</u> response to proposed finding of fact 570 and 571 above.
281	Not credible. Ms. LaRose's testimony was based on her feelings and entirely speculative. Her testimony was also not scientifically verifiable or logically credible and should be given no weight. <u>See e.g.</u> , UH-TIO FOF ¶566.  <u>See</u> response to proposed finding of fact 275 above. <u>See</u> response to proposed finding of fact 178 above regarding beliefs.
282	<u>See</u> response to proposed finding of fact 281 above.
283	<u>See</u> response to proposed finding of fact 281 above.

FCO's Exceptions at HO FOF 731 [FCO's Exceptions at 62]: The FCO's Exceptions to HO FOF 731 are Inaccurate/False, Not Credible, and Unsupported/Unsubstantiated. HO FOF 731 does not misstate or mischaracterize Dr. Kahakalau's testimony. Dr. Kahakalau did acknowledge during her testimony that there are reports that indicate that there are no burials located on the TMT Project site. *See* 1/9/17 at 179:7-13. She also testified to her general experience with large construction projects. *See id.* The Hearing Officer's finding that Dr. Kahakalau's general experience is not evidence of actual burials on the TMT Project site is also a reasonable statement. HO FOF 731 is supported by the reliable, probative, and substantial evidence in the record.

FCO's Exceptions to HO FOF 663 [FCO's Exceptions at 62-63]: The FCO's Exceptions to HO FOF 663 are Inaccurate/False, Not Credible, and Unsupported/Unsubstantiated. It cannot be reasonably disputed that the Hearing Officer considered the testimony of Hawane Rios ("**Ms. Rios**"). *See* HO FOF 394-399. Indeed, a significant portion of Ms. Rios' testimony can be found in HO FOF 394-399. Upon considering Ms. Rios's testimony, the Hearing Officer determined that she did not prove unverifiable and intangible connections between certain ahu or shrines on Mauna Kea that may be affected by the TMT Project. Though UH Hilo and TIO do not dispute that Ms. Rios holds these beliefs, the fact remains that those beliefs and such intangible connections cannot be verified. Such unverifiable beliefs and intangible connections cannot serve as the basis to deny the CDUA for the TMT Project.

FCO's Exceptions to HO FOF 662 [FCO's Exceptions at 63-64]: The FCO's Exceptions to HO FOF 662 are Inaccurate/False, Not Credible, and Unsupported/Unsubstantiated. Ruth Aloua ("**Ms. Aloua**") herself testified that she was not claiming to be an expert in archaeology. Tr. 2/15/17 at 61:3-7. Consequently, the FCO's attempts to characterize Ms. Aloua as an expert in archaeology are contradicted by her own testimony. It is also undisputed that Ms. Aloua did not review the archaeological studies conducted for the MKSR and the Astronomy Precinct. *See* HO FOF 662. She also did not review the CDUA or EIS, or their incorporated documents, in depth. *See id.* The FCO argues that her failure to review these documents at all or in depth is of no consequence. Such an argument is absurd. Ms. Aloua was offering opinions criticizing the archaeological studies done by actual experts in the field. The fact that she relied upon a cherry-picked review of the relevant documents to make her opinions is extremely relevant and clearly demonstrates her lack of credibility. Ms. Aloua also criticized the conclusion that "CSH 1" and "CSH 2" were not historic properties. However, she admitted that she had never visited either

site before. *See* Tr. 2/15/17 at 76:8-13; 78:24-79:1. She also admitted that she had no evidence that CSH 1 was a historic property. *See id.* at 76:23-77:1. Based on the foregoing, the Hearing Officer's finding that Ms. Aloua was not credible was supported by the reliable, probative, and substantial evidence in the record.

The FCO also argues that there was no consultation. Section 2.3 of the Archaeological Inventory Survey for the TMT Project that was prepared by Cultural Surveys Hawaii, Inc. stated:

The community consultation effort for the proposed TMT Observatory Project is detailed in the companion Cultural Impact Assessment report. In general, Native Hawaiian organizations, government agencies and community members were contacted in order to identify potentially knowledgeable individuals with cultural expertise and/or knowledge of the Project area and the vicinity. The agencies consulted included the SHPD, Office of Hawaiian Affairs (OHA), and the Hawai'i Island Burial Council (HIBC).

Ex. R-5, Appx. G. at 8 (internal citation omitted).

Ms. Aloua testified that this type of review can be considered consultation. *See* Tr. 2/15/17 at 82:9-21.

FCO's Exceptions to HO FOF 228 [FCO's Exceptions at 64]: The FCO's Exceptions to HO FOF 228 are Inaccurate/False, Not Credible, and Unsupported/Unsubstantiated. The Section 2.3 reference in HO FOF 228 is stated above. Moreover, as Ms. Aloua did testify that the type of review detailed in Section 2.3 can be considered consultation. Consequently, HO FOF 228 is supported the reliable, probative, and substantial evidence in the whole record.

The FCO's argument that HO FOF 228 is irrelevant because Appendix G was in draft form at the time the EIS was submitted is baseless. Indeed, as the FCO admits, it was finalized and approved by SHPD in January 2011.

FCO's Exceptions to HO FOF 1046 [FCO's Exceptions at 64]: The FCO's Exceptions to HO FOF 1046 are Inaccurate/False, Not Credible, and Unsupported/Unsubstantiated. David Frankel ("**Mr. Frankel**") testified that Native Hawaiian Legal Corporation ("**NHLC**") represented Mr. Flores in other matters. *See* Tr. 1/11/17 at 38:23-39:2. Mr. Frankel was an attorney with NHLC. Consequently, through NHLC, Mr. Frankel did represent Mr. Flores as noted in HO FOF 1046.

FCO's Exceptions to HO COL 365 [FCO's Exceptions at 64-65]: The FCO's Exceptions to HO COL 365 are Inaccurate/False, Not Credible, and Unsupported/Unsubstantiated. This is a conclusion of law, not a finding of fact. The law clearly does not support the view that the beliefs of Petitioners and Opposing Intervenors give them veto power over any proposed land use on Mauna Kea. The FCO does not cite to any legal authority to the contrary.

FCO's Exceptions to HO COL386-387 [FCO's Exceptions at 65]: The FCO's Exceptions to HO COL 386-387 are Inaccurate/False, Not Credible, and Unsupported/Unsubstantiated. These are conclusions of law, not findings of fact. The law clearly does not support the view that the Petitioners and Opposing Intervenors should be able to control who accesses the mountain. The FCO does not cite to any legal authority to the contrary.

Moreover, Hank Fergerstrom ("**Mr. Fergerstrom**") testified that he gets to decide who gets to go to Mauna Kea or not "[o]n occasion." Tr. 1/23/17 at 234:7-9. Mr. Fergerstrom also testified that he decided who to give trespass notices to. *Id.* at 233:4-21. Consequently, HO COL 386-387 is supported by the reliable, probative, and substantial evidence in the whole record.

FCO's Exceptions to HO COL 384-385, 387 [FCO's Exceptions at 65]: The FCO's Exceptions to the identified HO COLs are Inaccurate/False, Not Credible, and

Unsupported/Unsubstantiated. Mr. Flores testified that spiritual and cultural practices could be considered religious practices “depend[ing] on the practice.” Tr. 1/30/17 at 234:16-19. HO COL 384 quoted to Dr. Kahakalau’s testimony where she testified to the sacredness of Mauna Kea. *See* HO COL 384. She also equated the sacredness of Mauna Kea to “any cathedral” and to “any temple.” *Id.* HO COL 385 likewise quoted to testimony of Professor Jonathan Osorio (“**Professor Osorio**”) where he testified that Mauna Kea is sacred. *See* HO COL 385.

Moreover, the Temple of Lono consistently referred to the “traditional Hawaiian faith” during the CCH. *See e.g.*, Prefiled Testimony of Frank Tamehameha Kamehaloha Anuumealani Nobriga, Kahuna of the Temple of Lono, dated October 8, 2016. In his direct testimony, Mr. Nobriga described the “traditional Hawaiian faith[,]” at times, as a religion. *See id.* at 6 (stating that the “traditional Hawaiian faith” is different from other religions). Consequently, HO COLs 384-385 and 387 are supported the reliable, probative, and substantial evidence in the whole record. More importantly, however, the FCO does not cite to any legal authority contradicting the well-established conclusion that “to withhold approval of the TMT Project based on the Petitioners’ and Opposing Intervenors’ arguments that their religious beliefs and practices should hold veto power over all uses of the lands on Mauna Kea, would violate the Establishment Clause of the federal and state constitutions.” HO COL 387.

FCO’s Exceptions to HO COL 381 [FCO’s Exceptions at 65]: The FCO’s Exceptions to HO COL 381 are Inaccurate/False, Not Credible, and Unsupported/Unsubstantiated. HO COL 381’s citation to Mr. Flores’ testimony was to support the statement therein that Petitioners and Opposing Intervenors believe Mauna Kea is a sacred site. Indeed, Mr. Flores testified in the cited pages to his belief and others’ beliefs regarding the sacredness of Mauna Kea. *See* Tr. 1/30/17 at 173:4-180:21. Moreover, despite arguing that the HO COL 381 mischaracterizes its

position, the FCO does not state in its exceptions that the TMT Project should be or can be placed in another part of the Mauna Kea summit area. Indeed, as Dr. Kahakalau testified, the building of the TMT Project is not negotiable. Tr. 1/9/17 at 116:22-117:4; *see also* Tr. 1/11/17 at 81:7-17 (Candace Fujikane testified that no “manmade structures” should be built on the Northern Plateau because the area is sacred); Tr. 1/23/17 at 24:25-25:8 (Michael Lee testified that Mauna Kea is “so significant and sacred” and “[t]he best place to put telescopes is outer space”); Tr. 2/27/17 at 210:6-10 (Tiffnie Kakalia testified that she would oppose the building of the TMT Project anywhere on Mauna Kea). HO COL 381 is supported by the reliable, probative, and substantial evidence in the whole record.

**H. There are no other “incongruities” in the HO FOF/COL. [FCO’s Exceptions at 65-69].**

FCO’s Exceptions to HO COL 1-2 [FCO’s Exceptions at 65-66]: The FCO’s Exceptions to the identified HO COLs are Inaccurate/False, Not Credible, Unsupported/Unsubstantiated, and a Mischaracterization of the applicable law. The FCO’s exceptions to HO COL 1-2 are meritless. HO COL 1-2 are accurate recitations of the applicable law and they are also consistent with the Hearing Officer’s Minute Order No. 19 [Doc. 281].

FCO’s Exceptions to HO COL 6 [FCO’s Exceptions at 66]: The FCO’s Exceptions to HO COL 6 are Inaccurate/False, Not Credible, and Unsupported/Unsubstantiated. The FCO’s exception to HO COL 6 is meritless. The FCO argues that the Hearing Officer in the HO FOF/COL “systematically ignored and failed to consider the testimony of all witnesses at the evidentiary hearing and all exhibits received into evidence.” FCO Exceptions at 66. However, as the FCO concedes, the Hearing Officer expressly stated that she considered all of the witness testimony and documents received into evidence in this matter:

The Hearing Officer considered the testimony of all witnesses at the evidentiary hearings and all exhibits received into evidence. The



mere fact that a particular witness testimony or exhibit may not be specifically referred to below does not and shall not be construed to mean that said testimony or exhibit was not considered. Rather, specific reference to said witness testimony or exhibit was excluded because, after due consideration of said testimony or exhibit, it was determined to be: (i) immaterial, (ii) irrelevant, (iii) contrary to law, (iv) less credible or persuasive, and/or (v) cumulative of other testimonies or exhibits specifically referred to below.

HO COL 6.

The FCO's broad argument that the HO FOF COL "systematically ignored" evidence is also plainly contradicted by the HO FOF/COL itself. Indeed, the HO FOF/COL cites, and in many cases quotes extensively from, the written and oral testimony of numerous Petitioners and Opposing Intervenors (and the witnesses called by those parties). *See e.g.*, HO FOF 3, 758-762, 828, 915 (K. Kealoha Pisciotto); HO FOF 5, 620, 692, 811-816, 913 (E. Kalani Flores); HO FOF 5, 400-423, 823, 831 (B. Pualani Case); HO FOF 6, 559, 807-809, 871, 894, 914 (Deborah Ward); HO FOF 4, 669 (Clarence Ching); HO FOF 7, 806 (Paul Neves); HO FOF 11, 802-803, 916, 980 (Mehana Kihoi); HO FOF 12 (Chase Michael Kaho'okahi Kanuha); HO FOF 13, 1006 (Harry Fergestrom); HO FOF 14, 787, 879 (Joseph Kualii Lindsey Camara); HO FOF 15, 805 (Jennifer Leina'ala Sleightholm); HO FOF 16 (Maelani Lee); HO FOF 17 (Richard Maele DeLeon); HO FOF 18, 560, 798-799, 853, 873, 875, 1004-1005 (Cindy Freitas); HO FOF 19, 608, 685, 786, 800-801, 831, 876 (William Freitas); HO FOF 21, 789, 880 (Kalikolehua Kanaele); HO FOF 22 (Stephanie-Malia Tabadda); HO FOF 23, 790 (Tiffnie Kakalia); HO FOF 24 (Glen Kila); HO FOF 25, 818 (Dwight Vicente); HO FOF 26 (Brannon Kamahana Kealoha); HO FOF 342-344, 463, 731-732, 753, 852, 895, 918 (Dr. Ku Kahakalau); HO FOF 320-321, 460, 514, 736, 820, 829, 950, 1003, 1012, 1017-1026, 1028-1032 (Professor Candace Fujikane); HO FOF 896, 911-912, 1001 (Marti Townsend); HO FOF 626, 824, 868, 979 (Laulani Teale); HO FOF 1043-1046 (David Frankel); FOF 700-701, 822, 917, 974 (Professor Jonathan Osorio);

HO FOF 821, 825-826 (Narissa Spies); HO FOF 490-491, 664-668, 919 (Dr. Kehaunani Abad); HO FOF 627 (Diana LaRose); HO FOF 361-368, 724-725, 866-867, 967-970 (Dr. Taualii Ku'ulei Kanahale); HO FOF 618-619, 819 (Professor Peter Mills); HO FOF 817 (Davin Vicente); HO FOF 380-393, 972-973 (Dr. Manulani Aluli Meyer); HO FOF 804 (Sara Kihoi); HO FOF 660-662 (Ruth Aloua); HO FOF 394-399, 663 (Hawane Rios); HO FOF 770-777 (Professor Gregory Johnson); HO FOF 988-991 (Nanci Munroe); HO FOF 872, 992-993 (Susan Rosier); HO FOF 796-797, 878 (Nelson Ho); HO FOF 793-795 (Professor N. Kaopua-Goodyear); HO FOF 975-977 (Professor Joseph Keaweaimoku Kaholokula); HO FOF 978 (Tammie Noelani Perreira); HO FOF 214 (Brian Cruz); HO FOF 778-782 (Prof. Mililani Trask); HO FOF 784 (Frank Nobriga); HO FOF 788 (Wiremu Carroll); HO FOF 783 (Ronald Fujiyoshi); HO FOF 459, 791, 869 (Keahi Tajon); HO FOF 537-540, 953 (Eric Hansen); and HO FOF 628, 870 (Michael Kumukauoha Lee).

Moreover, and contrary to the FCO's argument that the Hearing Officer simply cut and pasted from "UHH-TIO's joint document[.]" the vast majority of the Hearing Officer's proposed findings that quote (or extensively summarize) the Petitioners' and Opposing Intervenors' written and oral testimony (and the testimony of their witnesses) were not proposed by UHH or TIO, nor included in their joint proposed findings and conclusions. *See* UHH-TIO Joint Response to FCO Proposed FOF/COL.

The FCO's argument that the Hearing Officer "systematically ignored" Petitioners' and Opposing Intervenors' exhibits, motions, objections and other filings is also entirely without merit, as the record plainly demonstrates. *See e.g.*, HO FOF/COL at Appendices A-D (noting consideration and disposition of, collectively, Petitioners' and Opposing Intervenors' 277 motions, objections and other filings filed from April 15, 2016 through July 25, 2017 (excluding

numerous joinders and other memoranda in support); Minute Order No. 44 [Doc. 553] filed April 20, 2017 (noting Petitioners' and Opposing Intervenors' written direct testimony and exhibits received in evidence).

Simply stated, the Hearing Officer did not "systematically ignore[]" or "fail[]" to consider" the testimonies and exhibits received into evidence of Petitioners and Opposing Intervenors (and their witnesses). Instead, the HO FOF/COL clearly demonstrates that the Hearing Officer carefully and meticulously considered all the evidence in finding that the CDUA for the TMT Project should be approved.

FCO's Exceptions to HO FOF/COL at 8-13 and 198 [FCO's Exceptions at 66-67]: The FCO's Exceptions are Inaccurate/False, Not Credible, Unsupported/Unsubstantiated, and a Mischaracterization of the applicable law. The FCO takes exception to the foregoing pages in the HO FOF/COL regarding the parties to the CCH because they do not discuss or include a reference to HAR § 13-1-31(a). Notably, the FCO did not discuss or refer to HAR § 13-1-31(a) in the FCO Proposed FOF/COL. *See generally* FCO Proposed FOF/COL. Consequently, it is disingenuous for the FCO to argue that the Hearing Officer or UH Hilo and TIO "purposefully excluded" HAR § 13-1-31(a). By failing to raise it, the FCO also waived its right to raise this issue by failing to include in its FCO Proposed FOF/COL.

Nevertheless, the FCO incorrectly argues that the Hearing Officer's process of admitting parties did not comply with HAR § 13-1-31. HAR § 13-1-31 concerns the admission of parties. It does not, as the FCO argues, limit the admission of parties to those that petitioned for a contested case hearing. Rather, HAR § 13-1-31(b) and (c) identifies both mandatory and permissive or discretionary parties, which broadly includes anyone who "can show a substantial

interest in the matter.” *Id.* The Hearing Officer correctly applied HAR § 13-1-31(b) and (c) in determining who should be admitted as parties in this CCH.

The FCO speciously argues that the Hearing Officer re-classified intervenors as parties to conform to HAR § 13-1-31. Intervenors are parties and any argument to the contrary is baseless and unfounded.

The FCO argues that the Hearing Officer’s admission of parties was untimely. HAR § 13-1-31(a) provides that the parties to a contested case shall be determined “within a reasonable time following the ten-day period following the board meeting.” *Id.* The Rules of Practice and Procedure do not define “a reasonable time.” However, the term “reasonable” must necessarily accounts for the surrounding circumstances. In this case, the Hearing Officer determined the parties within 45 days of the contested case being submitted to her by the BLNR through Minute Order No. 4 and within 4 months of the matter being remanded to the BLNR pursuant to the Hawai‘i Supreme Court’s decision in *Mauna Kea Anaina Hou*. This time period, under the circumstances, is clearly a “reasonable time” under HAR § 13-1-31(a) and the FCO’s arguments to the contrary should be rejected.

FCO’s Exceptions to HO COL 25 [FCO’s Exceptions at 67]: The FCO’s Exceptions to HO COL 25 are Inaccurate/False, Not Credible, Unsupported/Unsubstantiated, and a Mischaracterization of the applicable law TIO was admitted as a party to the CCH under HAR § 13-1-31(c) because the Hearing Officer found that “TIO’s participation will substantially assist the Hearing Officer in her decision making.” Minute Order No. 13 [Doc. 115] at 4. The FCO takes exception to HO COL 25 for the same reasons it took exception to HO FOF/COL at 8-13 and 198. UH Hilo and TIO hereby incorporate herein their response to the FCO’s exception to HO FOF/COL at 8-13 and 198. *See supra.*

FCO's Exceptions to HO FOF 135, 698, 705-710, 763-769, 776, 827, 909 [FCO's Exceptions at 67]: The FCO's Exceptions to the identified HO FOFs are Inaccurate/False, Not Credible, and Unsupported/Unsubstantiated. The FCO broadly takes exception to all of UH-Hilo's witnesses at the CCH. However, other than Messrs. Ishibashi and Baybayan, the FCO does not provide any explanation to support its broad exception to UH-Hilo's witnesses. Such baseless and unsupported exceptions should be rejected.

The FCO attacks the credibility of Messrs. Ishibashi and Baybayan, both Native Hawaiians who have a different view from FCO, arguing that they are biased because they are employed by UH-Hilo, OMKM, etc. *See* FCO Exceptions at 67. Preliminarily, Mr. Baybayan is no longer employed by UH-Hilo or its affiliates. *See* Ex. A-120. Instead, he is employed by the Polynesian Voyaging Society. *See id.* More importantly, however, the FCO fails to explain how this association to UH Hilo affected the credibility of Messrs. Ishibashi's and Baybayan's testimonies nor does it explain how any of the identified HO FOFs are inaccurate as a result of the claimed lack of reliability. For example, HO FOF 698 provides, in relevant part, that "[s]ome native Hawaiians, including native Hawaiian cultural practitioners with lineal or other significant ties to Mauna Kea – such as Ishibashi and Baybayan – support the TMT Project and testified that it would have no adverse impact on their cultural practices." *Id.* It is undisputed that Messrs. Ishibashi and Baybayan support the TMT Project. It is also undisputed that both testified that the TMT Project would have no adverse impact on their cultural practices. Indeed, the FCO do not provide any evidence to the contrary. HO FOF 698 is therefore factually accurate and supported by the reliable, probative, and substantial evidence in the whole record. Similarly, HO FOF 135, 698, 705-710, 763-769, 776, 827, and 909 are all factually accurate (as supported by the citations therein) and supported by the reliable, probative, and substantial

evidence in the whole record. General and unsupported claims of bias without actual proof of inaccuracy are meritless.

The FCO speciously argues that the testimonies of Messrs. Ishibashi and Baybayan are biased and should be disregarded because they testified in the first CCH and other hearings in support of the TMT Project. By this failed logic, the testimony of Mr. Flores should be disregarded because he testified at the first CCH and other hearings against the TMT Project. On its face, the FCO's argument is baseless, specious, and unfounded.

It also bears repeating that the BLNR should consider and give due regard to the Hearing Officer's credibility determinations so long as it finds that such credibility determinations are supported by the reliable, probative, and substantial evidence in the whole record. The Hearing Officer's credibility determinations in this case are supported by the reliable, probative, and substantial evidence in the whole record.

FCO's Exceptions to HO FOF 301-308, 268, 317, 345, 699, 704, 714-723, 739, 754, 764, 810, 849, 927, 959, 1034-1042; HO COL 350 [FCO's Exceptions at 67]: The FCO's Exceptions to the identified HO FOFs are Inaccurate/False, Not Credible, and Unsupported/Unsubstantiated. The FCO broadly takes exception to all of TIO's witnesses at the CCH. However, other than Naea Stevens ("**Mr. Stevens**"), Dr. Heather Kaluna ("**Dr. Kaluna**"), Dr. Paul Coleman ("**Dr. Coleman**"), and Professor Callies, the FCO does not provide any explanation to supports its broad exception to TIO's witnesses. Such baseless and unsupported exceptions should be rejected.

The FCO attacks the credibility of Mr. Stevens, Dr. Kaluna, and Dr. Coleman, all Native Hawaiians who have a different view from the FCO, claiming that they are biased because they are employed by UH-Hilo. The FCO, however, fails to explain how this association affected the

credibility of their respective testimonies nor does it explain how any of the identified HO FOFs or HO COL are inaccurate as a result of the claimed lack of credibility. For example, HO FOF 301 extensively quotes Dr. Coleman's written direct testimony. There is no question that Dr. Coleman testified as found in HO FOF 301. HO FOF 302 states, in part, that "Dr. Coleman testified that he is aware of only four native Hawaiians in the world who currently hold astronomy degrees." It is undisputed that Dr. Coleman testified as such (in fact, he testified to it twice). *See* Tr. 1/5/17 at 97:3-23, 126:8-11. HO FOF 303-306 continue on to recap Dr. Coleman's testimony at the CCH. There is no dispute (and the FCO provides no evidence to the contrary) that these HO FOFs accurately capture Dr. Coleman's testimony. HO FOF 307 extensively quotes Dr. Kaluna's testimony. There is no question that Dr. Kaluna testified as found in HO FOF 307. HO FOF 307 is therefore factually accurate. HO FOF 308 provides, in part, that Dr. Kaluna "participated in and benefited from the Akamai program, as well as the Keahola STEM program, during her studies at the University." *Id.* There is no dispute that Dr. Kaluna benefited from these programs and the FCO does not cite to any evidence to the contrary. HO FOF 308 is therefore factually accurate. Simply stated, the identified HO FOFs and COL are all factually accurate (as supported by the citations therein) and supported by the reliable, probative, and substantial evidence in the whole record. General and unsupported claims of bias without actual proof of inaccuracy are meritless.

The FCO next attacks Mr. Stevens, Dr. Kaluna, and Dr. Coleman claiming that Native Hawaiian cultural traditions and practices, outside of their own, were "notably beyond their areas of knowledge and expertise." FCO Exceptions at 67-68. The FCO does not provide any evidence to support their unwarranted attack. Moreover, as certain Petitioners and Opposing Intervenors acknowledged during the CCH, native Hawaiian cultural and religious traditions and

practices are individual and personal in nature, and vary from practitioner to practitioner. *See e.g.*, Tr. 2/13/17 at 108:5-16 (Kealoha Pisciotta testified that cultural practices can be very personal in nature and vary from person to person and “family to family”); Tr. 2/14/17 at 110:17-111:1 (Ms. Kihoi testified that there are many different forms and types of cultural practices and they are personal and unique to the individual). Consequently, as such cultural practices are very personal in nature, Mr. Stevens, Dr. Kaluna, and Dr. Coleman testified to their own, personal cultural practices. Mr. Stevens, Dr. Kaluna, and Dr. Coleman all testified that their cultural practices will not be impacted by the building of the TMT Project. *See* HO FOF 699 and 718.

The FCO argues that the statements of Mr. Stevens, Dr. Kaluna, and Dr. Coleman concerning cultural practices were contradicted by the 2000 Master Plan, CMP, etc. *See* FCO Exceptions at 68. The FCO does not state which statements were allegedly contradicted nor does it provide a specific cite to the 2000 Master Plan, CMP, etc. that allegedly contradicts these unidentified statements. The FCO’s baseless and unsupported exceptions should be rejected.

The FCO next argues that the testimony of Professor Callies should be excluded because he “offered irrelevant legal opinions and due to his pro-development and other bias in these matters.” FCO Exceptions at 68. Preliminarily, these arguments should have been made before Professor Callies testified. Neither the FCO nor any other party objected prior to Professor Callies testifying. Nevertheless, Professor Callies testified and expressed his opinions as one of the foremost recognized experts in planning and land use in Hawai‘i. *See* HO FOF 1034. He was not expressing legal opinions. Professor Callies’ testimony is largely summarized in HO FOF 1034-1042. The FCO does not claim that HO FOF 1034-1042 do not accurately capture Professor Callies’ testimony. Moreover, the FCO does not provide any evidence or even argue



that Professor Callies' testimony is inaccurate. HO FOF 1034-1042 are factually accurate and supported by the reliable, probative, and substantial evidence in the whole record.

FCO's Exceptions to HO FOF 294-300, 699 [FCO's Exceptions at 68]: The FCO's Exceptions to the identified HO FOFs are Inaccurate/False, Not Credible, and Unsupported/Unsubstantiated. The FCO takes exception to PUEO's witnesses at the CCH and speciously argues that their testimonies were "immaterial and irrelevant to the core issues set forth in Minute Order No. 19." FCO Exceptions at 68. Minute Order No. 19 [Doc. 281] provided that one of the issues to be addressed in the CCH was whether the TMT Project was consistent with the eight criteria in HAR § 13-5-30(c). *See id.* The Hawai'i Supreme Court in *Kilakila* specifically held that the BLNR may consider the scientific, cultural, and educational benefits of a project as mitigating effects under HAR § 13-5-30(c)(4). *See id.* at 404, 382 P.3d at 216. The testimony of PUEO's members at the CCH established that there is a need for educational opportunities in Hawai'i, specifically on Hawai'i Island. See HO FOF 296. Indeed, PUEO was formed by native Hawaiians who support the pursuit of educational opportunities for the children of Hawai'i. PUEO intervened in this CCH to express their views that the TMT Project will greatly enhance the educational opportunities for Hawaii's children. *See* HO FOF 295. Consequently, the testimony from PUEO's members was material and extremely relevant to the issues addressed in Minute Order No. 19.

The FCO next argues that the testimonies of PUEO's members should be disregarded because their counsel did not file proposed findings of fact and conclusions of law. Preliminarily, PUEO did file a substantive joinder to the UHH-TIO Proposed FOF/COL. *See* Doc. 730. Regardless, there is no requirement to file proposed findings of fact and conclusions of law. Indeed, HAR § 13-1-38(a) makes clear that the filing of proposed findings of fact and

conclusions of law is optional, not mandatory. The FCO's argument that the testimonies of PUEO's members should be disregarded or given no significant weight is therefore meritless. The testimonies of PUEO's Members should be considered and given significant weight especially regarding the educational benefits of the TMT Project.

FCO's Exceptions to HO COL 14-16 [FCO's Exceptions at 68]: The FCO's Exceptions to the identified HO COLs are Inaccurate/False, Not Credible, and Unsupported/Unsubstantiated. HO COL 14-16 establishes BLNR and the State of Hawaii's jurisdiction to hear the CCH. HO COL 14-16 are accurate statements of the law as reflected in the cases cited therein. The FCO does not argue that the cases cited therein do not support the conclusions in HO COL 14-16. These are well-settled and accurate conclusions of law.

FCO's Exceptions to HO FOF 357-360 [FCO's Exceptions at 68]: The FCO's Exceptions to the identified HO FOFs are Inaccurate/False, Not Credible, Unsupported/Unsubstantiated, and a Mischaracterization of the applicable law. The FCO misconstrues the Hawaii Supreme Court's opinion in *Mauna Kea Anaina Hou*. The Hawaii Supreme Court remanded this matter back to BLNR because it found that BLNR prejudged the CDUA by conditionally approving the permit before having a contested case hearing. The Hawaii Supreme Court did not remand the matter or find error because OCCL prepared and submitted their staff report prior to having a contested case hearing.

The FCO takes broad exception to HO FOF 357-360 claiming they are inaccurate and/or misleading. The FCO also argue that the Hearing Officer did not exercise due diligence to substantiate and authentic these findings. Notably missing from the FCO's exceptions is any explanation as to how any of the identified HO FOFs are inaccurate and/or misleading. Such baseless and unsupported exceptions should be rejected by the BLNR. HO FOF 357-360 are

factually accurate and supported by the reliable, probative, and substantial evidence in the whole record.

The FCO's argument concerning spoliation of evidence is also meritless. Indeed, the FCO fails to produce any evidence to support its baseless and unfounded claim of spoliation of evidence. Such baseless and unsupported arguments should be rejected. *See infra* for further discussion regarding the FCO's claim of spoliation of evidence.

FCO's Exceptions to HO FOF 234 [FCO's Exceptions at 69]: The FCO's Exceptions to the HO FOF 234 is Unsupported/Unsubstantiated. HO FOF 234 should state Ed Stevens, not Naea Stevens. Other than this typographical error, the FCO does not state that anything else in HO FOF 234 is inaccurate or unsupported.

FCO's Exceptions to HO COL 209 [FCO's Exceptions at 69]: It is unclear what HO COL 209 is referring to and, as a result, it should be disregarded by BLNR.

FCO's Exceptions to HO FOF 271, 439, 452, 482; COL 139, 150 [FCO's Exceptions at 69]: The FCO's Exceptions to the identified HO FOFs are Inaccurate/False, Not Credible, Unsupported/Unsubstantiated, and a Mischaracterization of the applicable law. HAR § 13-5-2 provides a non-exhaustive list of natural resources. Indeed, it defines to natural resources to mean "resources *such as* plants, aquatic life and wildlife, cultural, historic, recreational, geologic, and archaeological sites, scenic areas, ecologically significant areas, watersheds, and minerals." HAR § 13-5-2 (emphasis added). The use of "such as" indicates that the list provided in HAR § 13-5-2 is not exhaustive and merely illustrative. *See e.g., Bragdon v. Abbott*, 524 U.S. 624, 639 (1998) ("[T]he use of the term 'such as' confirms, the list is illustrative, not exhaustive."). Consequently, HAR § 13-5-2 does not provide an exhaustive list of the natural

resources that should be considered by BLNR and the FCO's argument to the contrary is incorrect.

The "little to no cloud cover[,] "stable atmosphere[,] "low mean temperature and temperature variability[,] "low humidity[,] "low light pollution[,] and "location at a favorable latitude" are all natural resources that together make Mauna Kea an outstanding location for astronomical research. HO FOF 271. These natural resources must also be "conserve[d], protect[ed], and preserve[d] . . . through appropriate management and use to promote their long-term sustainability and the public health, safety and welfare." Haw. Rev. Stat. § 183C-1.

FCO's Exceptions to HO FOF 82, 1002 [FCO's Exceptions at 69]: The FCO's Exceptions to the identified HO FOFs are Inaccurate/False, Not Credible, and Unsupported/Unsubstantiated. During the site visit, the Hearing Officer visited the Batch Plant, the proposed TMT site, and the Summit Loop road near the Keck Observatory. There was also a demonstration of a red helium balloon attached to a 187 foot rope at the proposed TMT site. *See* HO FOF 81. The FCO does not take exception to HO FOF 81. The Hearing Officer determined how the site visit was to be conducted after receiving input from the parties. She also instructed how the site visit was to be conducted. *See* Tr. 12/8/17 at 135:3-136:9. Based on the foregoing, it was reasonable for the Hearing Officer to find that "[she] had a reasonable period of time and conditions for viewing the general landscape and areas proposed for the TMT Project" and that the site visit was "reasonable and appropriate for the purposes of the case." HO FOF 82.

HO FOF 1002 does not have a specific citation. However, these are observations from the site visit that the Hearing Officer believed were factually accurate based on her personal observations.

FCO's Exceptions to HO COL 78-79 [FCO Exceptions at 69]: The FCO's Exceptions to the identified HO COLs are Inaccurate/False, Not Credible, and Unsupported/Unsubstantiated. The FCO does not explain its reason for its exceptions to HO COL 78-79. HO COL 78-79 are accurate statements of law concerning the applicable burden and degree or quantum of proof. The Hearing Officer also concluded that UH Hilo has the initial burden of proof in this CCH. *See* HO COL 80.

FCO's Exceptions to HO FOF 518-519, 524, 577, 619, 621, 640, 662, 680, 681, 683, 745, 759, 785, 797, 813, 834, 845, 889, 947-948; COL 111-112 [FCO's Exceptions at 69]: The FCO's Exceptions to the identified HO FOFs are Inaccurate/False, Not Credible, and Unsupported/Unsubstantiated. The FCO takes exception to the identified HO FOFs and HO COLs because they claim that a Supplemental EIS should be completed. The FCO argues that the FEIS for the TMT Project is outdated and contains incorrect data and information. Preliminarily, the FCO fails to cite to any legal authority supporting its specious argument that a Supplemental EIS should be completed. Next, the FCO fails, as has been a consistent pattern, to explain in any detail what information in the FEIS is allegedly outdated or incorrect. Such baseless and unsupported exceptions should be rejected.

FCO's Exceptions to HO COL 120-123 [FCO's Exceptions at 69]: The FCO's Exceptions to the identified HO FOFs are Inaccurate/False, Not Credible, and Unsupported/Unsubstantiated. The FCO fails to explain how HO COL 120-123 are inaccurate and/or misstated. Such baseless and unsupported exceptions should be rejected. HO COL 120-123 are accurate statements of law from past BLNR decisions.

#### **I. Other Matters [FCO Exceptions at 70].**

There is no proof of spoliation of evidence. The FCO's Exceptions are Inaccurate/False, Not Credible, and Unsupported/Unsubstantiated. The FCO repeats its baseless and unsupported

accusations of spoliation of evidence. Indeed, and has been the case every single time the FCO has raised this issue, the FCO has absolutely no evidence or proof of spoliation of evidence. *See* FCO Exceptions at 70; *see also* Flores-Case ‘Ohana’s Motion to Reconsider Minute Order No. 44 and Notice of Spoliation of Evidence [Doc. 577] at 7; Flores-Case Ohana’s Response to Applicant University of Hawaii at Hilo’s Doc. Nos. 592 and 615 [Doc. 623] at 6.

The burden to prove spoliation of evidence is on the party claiming spoliation. *See* 325 *Goodrich Ave., LLC v. Southwest Water Co.*, 891 F.Supp2d 1364, 1376 (M.D. Ga. 2012). The party claiming spoliation of evidence must prove, *inter alia*, that “the evidence was crucial to his case.” *Id.* The FCO has not come close to satisfying its burden because it has never produced any evidence to establish that spoliation of evidence has occurred. Indeed, the FCO’s bare accusations are not evidence. The FCO has also failed to prove that the alleged spoliated evidence was crucial to its case. The FCO’s claim of spoliation of evidence is baseless, unsupported and meritless and was properly rejected by the Hearing Officer on several occasions. The BLNR should do the same.

The FCO has not been prejudiced by the known and reasonable deadlines set by the Hearing Officer in the CCH. The FCO’s Exceptions are Inaccurate/False, Not Credible, Unsupported/Unsubstantiated, and a Mischaracterization of the applicable law. The FCO’s claim of prejudice based on known and reasonable deadlines is baseless. The deadlines imposed by the Hearing Officer were reasonable and applied equally to all parties. The FCO complains about the “enormous volume of exhibits and documents filed and the extensive amount of testimony delivered from 71 witnesses during the 44 days of hearing.” FCO Exceptions at 70. The significant majority of the exhibits and witness testimony came from Petitioners and Opposing Intervenors (and their witnesses). Indeed, it was clear throughout the CCH that Petitioners and

Opposing Intervenors were attempting to delay and prolong the CCH as much as possible. Consequently, the Petitioners and Opposing Intervenors can only blame themselves for the voluminous record (much of which is unduly repetitious and irrelevant). They cannot now argue that their own actions unduly prejudiced them.

HAR § 13-1-38(a) provides that “[a]fter all *evidence* has been taken, the parties may submit, within the time set by the presiding officer, a proposed decision and order which shall include proposed findings of facts and conclusions of law.” *Id.* (emphasis added) The Hearing Officer issued Minute Order No. 51 [Doc. 647] on May 25, 2017, which ruled on the parties’ motions for reconsideration regarding the Hearing Officer’s prior evidentiary rulings in Minute Order No. 44 [Doc. 553]. *See also* Minute Order No. 44, Amended, Order Regarding Documentary Evidence, dated May 26, 2017 [Doc. 649]. Consequently, all evidence had been taken, at the very latest, as of May 25 or 26, 2017, before the parties’ proposed findings of fact and conclusions of law were due on May 30, 2017. *See* Minute Order No. 43 [Doc. 552]. The Hearing Officer’s deadline for the filing of proposed findings of fact and conclusions therefore complied with the applicable administrative rules. The FCO mistakenly believes that Minute Orders constitute evidence. They do not. Consequently, the fact that the Hearing Officer issued Minute Orders after the deadline to submit proposed findings of fact and conclusions of law did not violate the applicable administrative rules.

The Petitioners and Opposing Intervenors collectively filed 277 motions, objections and other filings (excluding numerous joinders and other memoranda in support) from April 15, 2016 through July 15, 2017. The Hearing Officer considered and ruled on all of these filings, many of which were untimely, as detailed in Appendix A to the HO FOF/COL. The FCO’s claims that they were denied due process, unduly prejudiced, or somehow not heard are meritless.

FCO's Exceptions to HO COL 53-56 [FCO's Exceptions at 71]: The FCO's Exceptions to the identified HO COLs are Inaccurate/False, Not Credible, and Unsupported/Unsubstantiated. The FCO does not dispute that HO COL 53-56 are accurate statements of law. Instead, the FCO speciously argues that the Hearing Officer did not apply the liberal evidentiary standard in the CCH. This argument is belied by the record in this case. Indeed, using the FCO's own words, there was an "enormous volume of exhibits and documents filed and the extensive amount of testimony delivered from 71 witnesses during the 44 days of hearing." FCO Exceptions at 70. The FCO argues that the Hearing Officer did not admit relevant and material exhibits into evidence, but fail to identify those exhibits in the FCO's Exceptions. Such general and unsupported exceptions do not comply with Minute Order No. 103 or the applicable administrative and should be rejected by BLNR.

HO COL 124-466 and Recommended Decision and Order: The FCO's Exceptions are Inaccurate/False, Not Credible, Not in Evidence and Unsupported/Unsubstantiated. The FCO claim that the Recommended Decision and Order is nearly identical to documents submitted by UH Hilo and the hearing officer from the 2011 contested case hearing. Those documents are not part of the evidence in this CCH and cannot be cited here. Notably, the FCO does not argue against any of the conditions nor do they argue that the conditions are insufficient.

## V. CONCLUSION

For the reasons set forth herein and in the UH Hilo Pre-Hearing Statement, TIO's Pre-Hearing Statement, the testimony of UH Hilo's and TIO's witnesses, UH Hilo's and TIO's evidence, the examination of the Petitioners' and Opposing Intervenors' witnesses, and in UH Hilo's and TIO's other filings, and the HO FOF/COL, UH Hilo and TIO respectfully jointly request that the BLNR reject the FCO's Exceptions, and adopt the HO FOF/COL as revised to



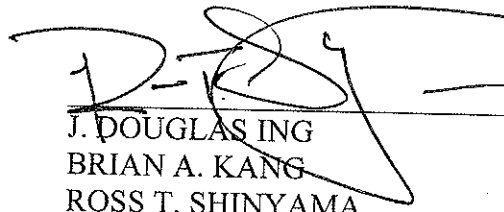
reflect UH Hilo's and TIO's respective proposed exceptions filed on August 21, 2017 [Docs. 816 & 813, respectively].

DATED: Honolulu, Hawai'i, September 11, 2017.



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## Appendix A

<b>General Responses to Petitioners'/Opposing Intervenors' Exceptions</b>	
<b>Fails to comply with Minute Order No. 103 and HAR § 13-1-42(b)</b>	The Exception should be disregarded because it fails to (1) set forth specifically the questions of procedure, fact, law, or policy, to which exceptions are taken; (2) identify that part of the hearing officer's report and recommended order to which objections are made; or (3) state all grounds for exceptions to a ruling, finding, conclusion, or recommendations. The grounds not cited or specifically urged are waived.
<b>Citation does not support the proposition.</b>	The citation offered by Petitioners/Opposing Intervenors does not support the Exception.
<b>Estoppel/Improper Reconsideration</b>	The Exception or a portion thereof is improper to the extent it is barred by estoppel or waiver, or improperly seeks reconsideration of the Hearing Officer's or the BLNR's prior ruling,
<b>Inaccurate/False</b>	The Exception or a portion thereof is inaccurate or false.
<b>Incomplete.</b>	The Exception is materially incomplete.
<b>Irrelevant/Inapplicable.</b>	The information in the Exception is irrelevant or inapplicable in this contested case proceeding. <i>See</i> Minute Order No. 19 [Doc. 281].
<b>Lack of Jurisdiction</b>	The Exception exceeds the scope of the Hearing Officer's jurisdiction and/or delegated authority
<b>Mischaracterization.</b>	The Exception mischaracterizes legal authority or the contents of the record.
<b>Misleading. Partial quotation.</b>	The Exception contains a partial quote from legal authority or a document in the record, and the incompleteness of the quotation is likely to mislead the reader.
<b>Misleading. Presented out of context.</b>	The Exception presents law or information in the record out of context and/or in a way that is likely to mislead the reader.

<b>Misrepresentation</b>	The Exception affirmatively misrepresents legal authority or the contents of the record.
<b>Not credible.</b>	The Exception is not credible based on the totality of the evidence contained in the record and/or the demonstrated biases of the witness whose testimony is cited in support of the Exception.
<b>Not in dispute.</b>	Either (1) the Exception is not at issue in this proceeding, or (2) standing alone, the Exception is not objectionable. The designation of any individual Exception as “not in dispute” does not and should not be construed as an admission of said Exception or a concession that said Exception should be incorporated into the final FOFs and COLs. It also does not and should not be construed as assent to any inferences suggested or that may be suggested by Petitioners/Opposing Intervenors from, e.g., their misleading grouping or ordering of otherwise unrelated facts.
<b>Not in evidence.</b>	The Exception asserts “facts” and/or cites documents that are not in evidence.
<b>Unsupported/Unsubstantiated</b>	The Exception is not supported by information in the record or was not substantiated by the Petitioners/Opposing Intervenors through the contested case process.

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

Contested Case Hearing Re Conservation  
District Use Application (CDUA) HA-3568  
for the Thirty Meter Telescope at the Mauna  
Kea Science Reserve, Ka'ohē Mauka,  
Hāmakua, Hawai'i, TMK (3) 4-4-015:009

BLNR Contested Case HA-16-002

**CERTIFICATE OF SERVICE**

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the attached document was served upon the following parties by the means indicated:

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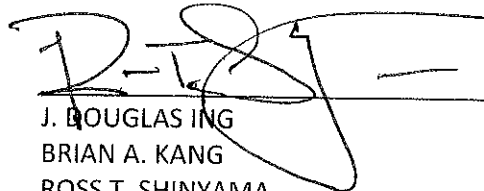
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